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# LAW IS THE MERE CONTINUATION OF POLITICS BY DIFFERENT MEANS: AMERICAN JUDICIAL SELECTION IN THE TWENTY-FIRST CENTURY\*

Herbert M. Kritzer\*\*

## INTRODUCTION

In March 2006, the *New York Times* reported that a man in Afghanistan was facing a death sentence for the crime of apostasy—converting from Islam to Christianity.<sup>1</sup> The United States Secretary of State reportedly called the President of Afghanistan to urge a “favorable resolution.”<sup>2</sup> Meanwhile, the Afghani judge expressed his intention to maintain his judicial independence and resist interference with the resolution of the case.<sup>3</sup> As Americans, we would be appalled that anyone would face a death sentence for a personal decision about religion. But how do we feel about a judge exercising independent judgment under the law in such a case? Don’t we want judges to exercise their independent judgment in interpreting and applying the law?

The answer to this question is yes *and* no. We want judges to exercise their independent judgment, so long as they are not too independent. We also want judges to be accountable to the public. We value judicial independence, just not too much of it. We want judges to “call’em like they see’em,” provided that “they don’t see’em too differently from the way we see’em.” We are fundamentally conflicted

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\* While Carl von Clausewitz’s famous quote, “War is a mere continuation of policy by other means,” typically translates the German word *politik* as “politics,” *politik* can also be translated as “policy.” The translation of *On War* that I have actually translates the word as “policy,” but it proceeds to discuss war as a “political instrument.” CARL VON CLAUSEWITZ, *ON WAR* 119 (Anatol Rapoport ed., 1968) (1832).

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1. Andrea Elliott, *In Kabul, a Test for Shariah*, N.Y. TIMES, Mar. 26, 2006, § 4, at 3.

2. *Id.*

3. *Id.*

about the role of law in politics and the role of politics in law, and that is evident in our ambivalence toward the way we choose and retain judges.<sup>4</sup>

In fact, Americans are not alone in this struggle. As the role of courts has increased around the world,<sup>5</sup> country after country has begun to face what Professor Alan Paterson succinctly described as a "conundrum of the apparently insoluble tension between judicial independence and judicial accountability."<sup>6</sup> While other countries have come to see judicial selection as raising important political issues, this is by no means a new issue in the United States. Methods of judicial selection have changed over time to reflect the prevailing political fashion.<sup>7</sup> For example, with the rise of Jacksonian democracy, there were shifts from executive appointments to partisan elections. With the rise of progressivism, the shifts were toward nonpartisan elections. Recently, we have seen shifts toward a hybrid system that combines executive appointments with retention elections in which voters are asked whether the incumbent should be "retained in office."<sup>8</sup>

The issue of how we select judges has once again become a topic of discussion at both the federal and state level. Has the selection of judges become too political? Have interest groups corrupted the process of selecting the men and women who staff our courts? What is it that citizens look for when they are asked to participate directly in the process of selecting and retaining judges? In this Article, I present empirical information on how judicial selection operates in the United States and how it has evolved since World War II. I start with a brief discussion of the selection of judges for federal courts; I then turn to a more extended discussion of judicial selection in the states.

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4. See generally Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS., Summer 1998, at 79; Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003); Randall T. Shepard, *Judicial Independence and the Problem of Elections: "We Have Met the Enemy and He Is Us,"* 20 QUINNIPIAC L. REV. 753 (2001).

5. See generally THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Valinder eds., 1995).

6. Alan Paterson, *The Scottish Judicial Appointments Board: New Wine in Old Bottles?*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 13, 14 (Kate Malleson & Peter H. Russell eds., 2006) (discussing the dilemma in countries around the globe).

7. On the evolution of judicial selection methods, see Kelley Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 628-33 (2002) and Carrington, *supra* note 4, at 87-99.

8. This last system, which its proponents prefer to call "merit selection," also involves a mechanism for screening candidates to be considered by the executive doing the appointing. The American Judicature Society has been a key proponent of this system.

## II. JUDICIAL SELECTION

### A. Federal Judges

The federal judicial selection system is specified in the Constitution,<sup>9</sup> and has remained unchanged despite periodic calls to reconsider issues such as life tenure.<sup>10</sup> Federal judicial selection has always been political, whether at the Supreme Court,<sup>11</sup> circuit court, or district court level.<sup>12</sup> Interestingly, one of the quietest periods for the selection of United States Supreme Court Justices was the middle of the twentieth century. Figure 1 shows the proportion of Supreme Court nominations that were unsuccessful throughout American history across quarter-century periods (except for the first and last period shown, which are shorter); the last period covers only the three nominations by President George W. Bush, and should probably not weigh heavily in any analysis. Interestingly, if lack of success is a measure of the politicization of the process, then the peak of politicization came not in the late twentieth century, but in the middle of the nineteenth century.

While the rules governing federal judicial selection have been constant, the mechanics of the selection process and the nature of the politics surrounding it have changed in significant ways. At one time, the Senate voted on judicial nominees in closed session and until the middle of the twentieth century, judicial nominees usually did not testify before Senate committees. More importantly, the ways that interest groups seek to exercise influence over judicial selection have changed significantly with the rise of television advertising and mass fundraising techniques. Lower federal court selection has shifted from the politics of patronage to the politics of ideology. Professor Nancy Scherer argues in a recent book that this change is a result of the combination of heightened interest in judicial decisionmaking by

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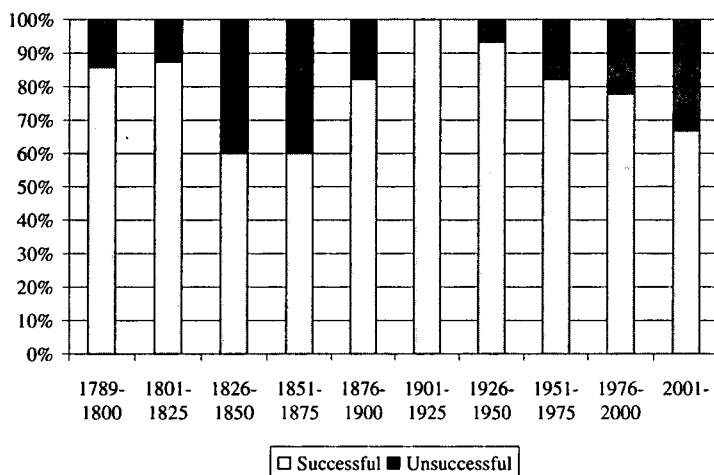
9. U.S. CONST. art. II, § 2.

10. See, e.g., REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006); Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579 (2005).

11. See generally HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON (rev. ed. 1999); JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES (1995).

12. See generally Kermit L. Hall, *The Children of the Cabins: The Lower Federal Judiciary, Modernization, and the Political Culture, 1789–1899*, 75 NW. U. L. REV. 423 (1980); Kermit L. Hall, *Social Backgrounds and Judicial Recruitment: A Nineteenth-Century Perspective on the Lower Federal Judiciary*, 29 W. POL. Q. 243 (1976).

FIGURE 1: SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES<sup>13</sup>



interest groups and changes in party structure.<sup>14</sup> The former arises from the increased role of judicial decisionmaking in day-to-day life, due to both the assertiveness of courts in the areas of civil liberties and civil rights and the generally increased role of government in the regulatory state. As the role of courts has changed, the role of parties has changed as well. Where parties were once fundamentally local, and members of Congress depended on local party organizations for support in obtaining and retaining office, today that role has been taken over by interest groups, which are powerful tools for both fundraising and voter mobilization. Where parties once sought patronage, interest groups now seek policies.<sup>15</sup>

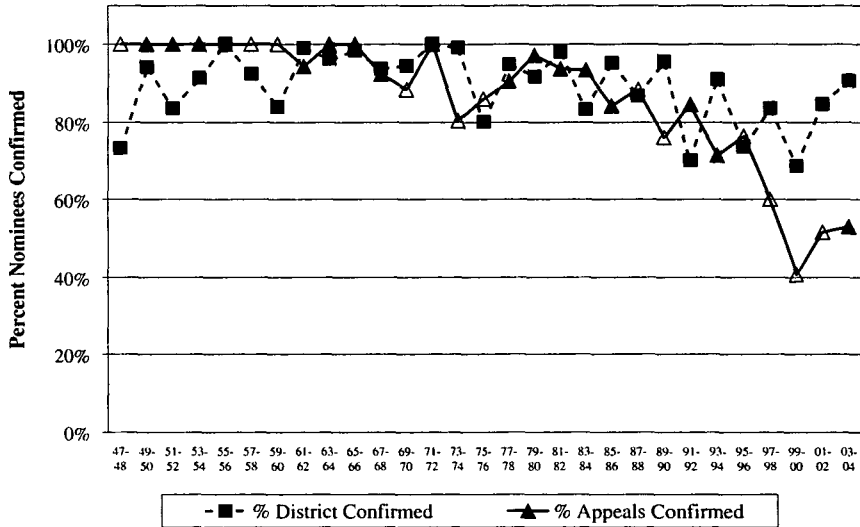
Patterns in the selection of judges for the federal courts of appeals and the federal district courts show these impacts. Figure 2 shows the percentage of nominees to federal district and appellate courts who were confirmed from 1947 through 2004. A drop in the confirmation rate began in the 1980s and sharpened in the 1990s. Figure 3, which draws on two slightly different but overlapping time series,<sup>16</sup> shows

13. ABRAHAM, *supra* note 11.

14. NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 192-96 (2005).

15. *Id.* at 28-46, 108-32. For other major studies of the lower federal court selection process, see generally HAROLD W. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS (1972); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997); JOEL B. GROSSMAN, LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION (1965); and NEIL D. MCFEELEY, APPOINTMENT OF JUDGES: THE JOHNSON PRESIDENCY (1987). For a more journalistic account of federal judicial selection circa 1970, see DONALD DALE JACKSON, JUDGES 247-76 (1974).

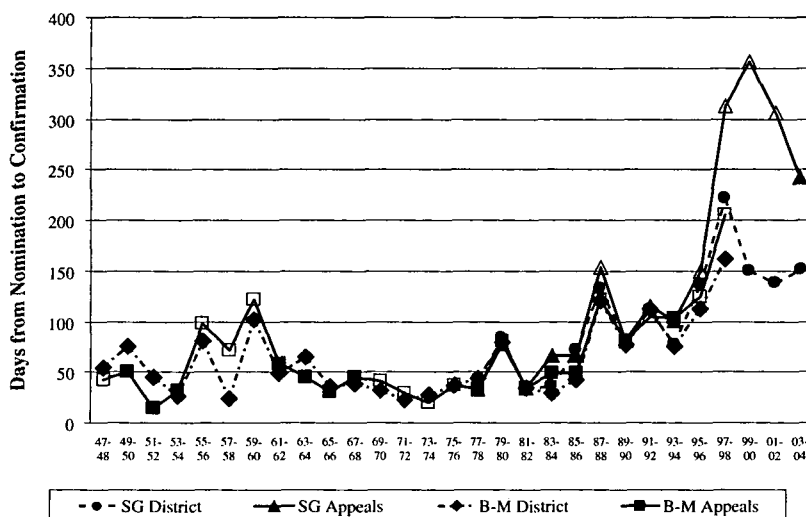
16. I use two time series here because neither covers the entire period.

FIGURE 2: PERCENTAGE OF NOMINEES CONFIRMED FOR LOWER FEDERAL COURTS<sup>17</sup>

the pace of the confirmation process slowing over time. Importantly, the change does not simply reflect divided government, because the pace of the confirmation does not vary consistently depending on whether the Senate is controlled by the President's party. For example, some of the fastest confirmations came during Richard Nixon's presidency when Democrats controlled the Senate. That the divided government did not appreciably affect the pace of confirmation makes sense if confirmation politics is largely about patronage.

A standard part of the rhetoric over contemporary federal judicial selection is that it has become politicized. Whichever party is "out" of the selection process decries the extreme views of the persons being nominated to the bench by the current President. This is probably traceable to the 1968 election, when both Nixon and third-party candidate George Wallace attacked the Supreme Court and liberal

17. See Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947–1998*, 46 AM. J. POL. SCI. 190 (2002) (including unpublished data the authors used in their analysis); Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871 (2005); Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274, 277 (1997).

FIGURE 3: PACE OF CONFIRMATION PROCESS<sup>18</sup>

judges—Nixon for criminal justice decisions<sup>19</sup> and Wallace for civil rights and civil liberties decisions.<sup>20</sup> Today, the selection of judges, particularly Supreme Court Justices, has become a highly visible aspect of presidential campaigns. While some of this revolves around controversial issues such as abortion and gay rights, it is by no means limited to those areas. As suggested by Scherer's analysis, it is not that selection has become more political; rather, the nature of politics has changed, with policy concerns supplanting patronage as the primary political force.<sup>21</sup>

18. See Binder & Maltzman, *supra* note 17 (referred to in Figure 3 as B-M); Goldman, *supra* note 17 (referred to in Figure 3 as SG).

19. In his Republican Party Presidential Nomination Acceptance Speech, Nixon stated that "some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country and we must act to restore that balance." American Presidency Project, Richard Nixon: Presidential Nomination Acceptance Speech, <http://www.presidency.ucsb.edu/ws/index.php?pid=25968> (last visited Jan. 27, 2007). Nixon used similar statements in a number of contexts, including his announcement of the Supreme Court nominations of Lewis Powell and William Rehnquist. See American Presidency Project, Richard Nixon: Address to the Nation Announcing Intention to Nominate Lewis F. Powell, Jr., and William H. Rehnquist to Be Associate Justices of the Supreme Court of the United States, <http://www.presidency.ucsb.edu/ws/print.php?pid=3196> (last visited Jan. 27, 2007).

20. Interestingly, while the 1964 presidential candidate Barry Goldwater appealed to Southern conservatives, explicit attacks on the Supreme Court were not as central to his campaign as they were for Nixon four years later. In part, that was because Nixon was able to frame his attacks around law and order issues rather than around the race issue that would have appealed to white Southerners upset about the Warren Court's decisions on civil rights. Also, most of the Warren Court's key criminal justice decisions came after the 1964 election, as did a wave of urban riots, including one set that occurred in 1968 after the assassination of Martin Luther King Jr.

21. See SCHERER, *supra* note 14, at 28–46.

### B. State Judges

Historically, the selection of state and local judges was very much a part of the patronage process.<sup>22</sup> Much of this reflected the influence of political machines, because controlling the local judiciary provided a source of patronage and protected the machine from actions by the courts.<sup>23</sup> For example, political machines used property assessments and the enforcement of building and health codes as tools to reward friends and punish enemies. For these tools to work effectively, machine politicians had to be confident that their actions would not be successfully challenged in the courts. Furthermore, courts are an excellent source of jobs—as bailiffs, clerks, or court reporters—and appointments to lucrative trusteeships for supporters.<sup>24</sup> All of these favors came with an expectation that money would flow back to the political machine in the form of contributions.<sup>25</sup> Thus, as with the federal courts, the political focus was largely on patronage rather than policy preferences. While nonpartisan elections were a part of the progressive movement, eliminating partisan elections was also a goal of the reformers who sought to end the dominance of political machines in major cities and in many states.<sup>26</sup>

The selection and retention of state judges is commonly described as relying on one of five methods:<sup>27</sup> executive appointment, legislative selection, partisan election, nonpartisan election, and merit selection.<sup>28</sup> This simple list obscures the wide variety of specific practices in use and it omits entirely selection by other judges and selection through a civil service system, which is commonly used in selecting administrative law judges.<sup>29</sup>

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22. See *id.* By saying “historically,” I do not mean to imply that patronage does not continue to play a major role in judicial selection in some states. See Leslie Eaton, *Party Politics Hold Sway in Choice of Judges Upstate, Too*, N.Y. TIMES, Nov. 17, 2003, at B1.

23. See JACKSON, *supra* note 15, at 186–97; MILTON L. RAKOVE, DON’T MAKE NO WAVES DON’T BACK NO LOSERS: AN INSIDER’S ANALYSIS OF THE DALEY MACHINE 221–29 (1975).

24. See MARTIN TOLCHIN & SUSAN TOLCHIN, TO THE VICTOR . . . POLITICAL PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE 131–60 (1971).

25. *Id.* at 144–60.

26. F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 449–51 (2004).

27. For an overview of the various methods, and an analysis of some of the issues they present, see CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES (1997).

28. *Id.* at 21. The latter method involves nomination by a nominating commission or committee, appointment by the governor from the list provided by the nominating commission, and then periodic retention elections where voters are asked whether the judge should continue in office. See *id.* at 125–45.

29. The most comprehensive information on the methods of judicial selection in the states is compiled by the American Judicature Society and can be found on their website. AJS, Judicial



Some states mix and match methods in complex ways. For example, when a judicial vacancy occurs in New Mexico, the governor fills the vacancy from a list forwarded by a nominating commission.<sup>30</sup> At the next general election, a contested partisan election is held to fill the seat for the remainder of the term;<sup>31</sup> the incumbent appointed by the governor is usually one of the candidates. Thereafter, the winner of the partisan election stands in a retention election at the end of each term.<sup>32</sup> Pennsylvania also has a hybrid system; open seats on the state's courts are filled through partisan elections, with incumbents standing in retention elections at the end of their terms.<sup>33</sup>

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Selection in the States, <http://www.ajs.org/js/materials.htm> (last visited Jan. 27, 2007). Various methods of initial selection are used:

- Gubernatorial appointment without confirmation
- Gubernatorial appointment without confirmation using a voluntary nominating commission
- Gubernatorial appointment subject to confirmation by the legislature
- Gubernatorial appointment subject to confirmation by an executive council or similar body
- Gubernatorial appointment without confirmation using a mandatory nominating commission
- Legislative selection
- Partisan elections (usually with the governor filling any vacancies occurring between elections, with or without some sort of nominating commission or committee)
- Nonpartisan elections (usually with the governor filling any vacancies occurring between elections, with or without some sort of nominating commission or committee; in some states all candidates must run in the primary and if a candidate gets a majority in the primary that candidate is deemed elected)
- Judicial appointment (usually of lower level judges or assistant judges)
- Civil service selection for administrative law judges

Methods of retention in office are equally varied:

- Service on good behavior (life tenure)
- Service on good behavior until mandatory retirement age
- Reappointment by the governor without confirmation
- Reappointment by the governor with confirmation
- Reappointment by the governor after renomination by a nominating commission (a "retention" reappointment, for example)
- Reelection in a partisan election
- Reelection in a nonpartisan election
- Retention election (required "yes" percentage varies)
- Reelection in a nonpartisan election that becomes a retention election if the incumbent is not opposed
- Reelection in either a partisan election or a retention election.

*Id.*

30. N.M. CONST. art. VI, §§ 35–36.

31. *Id.*

32. *Id.* § 33(A).

33. 42 PA. CONS. STAT. ANN. § 3131 (West 2004).

### C. *The Challenges of Electing Judges*

Most states use some kind of mass election to select or retain judges. The United States is almost unique in its use of elections in the judicial selection and retention process. I know of only two exceptions. The first is Switzerland, where judges in some smaller cantons are directly elected; judges in larger cantons are elected by parliamentary deputies.<sup>34</sup> The second exception, surprisingly, is Japan, where judges of the Supreme Court are required to stand for a retention election in the first general election after their appointment and then at the end of each ten-year term.<sup>35</sup> However, the structure of the election makes rejection extremely unlikely: a majority of ballots must show an X indicating a vote against continuing the judge in office, while no mark—which we would think of as abstaining—is treated as a vote for retaining the judge.<sup>36</sup> Moreover, very few judges ever stand for a second retention election given the mandatory retirement age of seventy and the general practice of not appointing someone to the Supreme Court until the person is at least sixty.<sup>37</sup> Thus, new appointees are essentially unknown, and the likelihood of the incumbent's defeat is virtually nonexistent. Even if a member of the Supreme Court became associated with unpopular decisions, few judges ever face a second election and thus are never forced to confront a dissatisfied public.<sup>38</sup>

The role of elections in American judicial selection is a manifestation of the American love affair with the idea of popular elections. We elect our judges because we want to elect our judges. In a national survey, respondents were given two statements and asked which was more convincing: (1) "Judges in my state should be elected to office" or (2) "Judges in my state should be appointed to office."<sup>39</sup> The survey showed that 63% found the first statement "much more convincing" and another 18% found the first statement "somewhat more convincing."<sup>40</sup> But it is not just that we want to elect judges; we seem

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34. SYBILLE BEDFORD, *THE FACES OF JUSTICE: A TRAVELLER'S REPORT* 240 (1961); Mirko Roß, *Switzerland*, in 4 *LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA* 1570, 1574 (Herbert M. Kritzer ed., 2002).

35. David M. O'Brien, *The Politics of Judicial Selection and Appointments in Japan and Ten South and Southeast Asian Countries*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER*, *supra* note 6, at 355, 359.

36. *Id.*

37. *Id.*

38. *Id.*

39. David B. Rottman, *The White Decision in the Court of Opinion: Views of Judges and the General Public*, 39 *CT. REV.* 16 tbl.10 at 21 (2002).

40. *Id.* Ironically, 80% of the respondents also believed that campaign contributions have "some" or "a great deal" of influence on judges' decisions. *Id.* at 22. This apparent schizophrenic

to be unable to accept other ways of selecting important public officials.

Several years ago, Carleton College political scientist Steven Schier published an op-ed piece in the *Minneapolis Star Tribune* while he was on leave teaching at York University in Toronto:

If you want to get a good laugh out of Canadian university students, just show them a copy of a 2002 Minnesota general election ballot. Last fall I taught courses on American politics at York University in Toronto, and no subject so interested my students as the many singular features of our peculiar electoral system.

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Consider my local 2002 Rice County ballot. It had 39 races—for federal and state legislative offices, state constitutional offices, county offices, school board, city offices and 18 judicial elections.

My Canadian students wondered how any voter could negotiate those choices knowledgeably. I had to admit, voters cannot. I told them that I voted in only 21 of the 39 races, because I had no idea about the other 18. In 2000, the ballot gave me 26 choices and I only voted in nine, having no knowledge about the other 17.

My students found it odd that Minnesota would ask voters to make so many choices, when even a political science professor who makes his living studying elections could not vote knowledgeably in half or more of them.

Minnesota's judicial elections were a particular hoot to the Canadians. I explained that Minnesota puts state judges up for election but that traditionally state law had prevented candidates from campaigning for judicial office, essentially requiring voters to choose in ignorance. They questioned the wisdom of electing judges, which happens nowhere in Canada, and could not see the logic of elections without campaigns.<sup>41</sup>

The singular importance of elections in American social and political life is captured by the old epithet, "He couldn't even get elected dog catcher!"

As it turns out, we do not elect dog catchers, but we have elected tree wardens, drain commissioners, mosquito control boards, and inspectors of hides.<sup>42</sup> The array of offices for which elections are held is

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nia was also evidenced when interviewers described the "merit selection" system and respondents were asked if they would support it—72% said they would strongly or somewhat support such a system. *Id.* at 23.

41. Steven E. Schier, *The Minnesota Ballot Is a Joke in Canada*, MINNEAPOLIS STAR TRIB., Dec. 22, 2002, at 4AA.

42. When I was residing in Houston, Texas, in the 1970s, a man filed papers to run for Inspector of Hides in Harris County, where Houston is located. No one had run for this office in living memory, and it was unlikely that more than a few people in the county were aware the office—unfilled for decades—even existed. The candidate announced his platform: he intended to inspect as many hides as he possibly could, particularly female hides! In fact, he ran for office in

astounding.<sup>43</sup> Many of these offices are associated with taxing authority,<sup>44</sup> and the principle of “no taxation without representation” continues to be strong. Nonetheless, the likelihood that voters can make meaningful choices in most elections is slim. Voters simply do not have the necessary information, and only in rare cases will they seek out that information.<sup>45</sup> Voters want to have a say, when they want to have a say, but most of the time, for most minor offices, they have no idea how to have a say unless there is some clear cue they can use to make a choice.

The problem of cues might be less important if there were fewer demands on voters. In most other democratic countries, voters are expected to make a limited set of choices. In the United Kingdom, for example, citizens generally elect only four or five officials: Member of Parliament, Member of European Parliament, county council, local council, and, in Greater London, mayor.<sup>46</sup> In Canada, voters choose members of the national parliament, the provincial parliament, local council, and school board trustee. Moreover, as Schier described it, “citizens of most constitutional democracies [ ] think of politics as a team sport,” where “[t]he teams are political parties, and it is the voters’ job to decide which party should direct the government.”<sup>47</sup>

Political scientists have established that the most important cue for voters is political party affiliation.<sup>48</sup> Party labels are signals, albeit imperfect ones, and voters rely heavily on them.<sup>49</sup> In the absence of

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large part because he felt it should be abolished, and it was abolished in Harris County soon thereafter; however, the office of Inspector of Hides does still exist in some Texas counties.

43. Other examples of officials we have elected include cemetery commissioner, park board (Minnesota), land commissioner (Texas), university board of regents, reclamation (Nebraska), county surveyor, bridge authority, prothonotary, library board, and fence inspector and hog reeve (elected at town meetings in New Hampshire, at least until the 1980s).

44. These offices include sewage district commissioners, bridge authorities, and mosquito control boards.

45. See generally Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Contested, Nonpartisan Judicial Elections: A Responsible Electorate or a Problematic Public?*, 36 W. POL. Q. 241 (1983).

46. In recent years, voters in Scotland also chose a member of the Scottish Parliament, voters in Wales chose a member of the Welsh Assembly, and voters in Northern Ireland chose a member of the Northern Ireland Assembly.

47. Schier, *supra* note 41.

48. See, e.g., ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1960); V.O. KEY, JR., *THE RESPONSIBLE ELECTORATE: RATIONALITY IN PRESIDENTIAL VOTING 1936-1960* (1966).

49. One study suggests that party labels may be the only cue that consistently affects voters in judicial elections, either in terms of turnout or in terms of vote choice. See David Klein & Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POL. RES. Q. 709 (2001).

party labels, voters look for other signals.<sup>50</sup> While the ideal citizen might be expected to research candidates running for office, such citizens are few and far between. Schier was confronted with a ballot involving thirty-nine elections,<sup>51</sup> only twenty-six of which were contested. Assume that for five, most voters could make a quick decision. How much time would it take a conscientious voter to research and reach a decision on the other twenty-one? Assuming ten minutes per contest, this would require three and a half hours. This also assumes that the voter knows before entering the voting booth who will be on the ballot, which is unlikely.

What kind of cues is a voter likely to rely on, particularly one who has little knowledge of what will actually be on the ballot? Some states allow candidates to include information on the ballot that can serve as a cue. Such information might be an indication of incumbency, a profession (for example, "Esq." for a lawyer), or a very short phrase that the candidate hopes will attract voters.

Other than party affiliation, the most common cue is name recognition. The single largest name recognition advantage comes through incumbency; voters will have heard of an officeholder and have a vague memory of that name. Seeing the name on the ballot activates that memory, and unless the voter has some negative association with the memory or always votes to "throw the bums out," the voter will likely back the recognized name.<sup>52</sup> There are many other ways that name recognition can be activated. In his seminal study of politics in the one-party American South during the first half of the twentieth century, Professor V.O. Key coined the phrase "friends and neighbors" voting to reflect the idea that candidates running in what amounted to nonpartisan elections—such as Democratic primaries—drew most heavily in their county of residence and surrounding counties.<sup>53</sup> Presumably, this effect was a manifestation of name recognition.

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50. See Mary L. Volcansek, *An Exploration of the Judicial Election Process*, 34 W. POL. Q. 572, 573-75 (1981).

51. Schier, *supra* note 41.

52. One recent study of state supreme court elections found that "high quality challengers," defined as those with previous service as a judge at some level of the court system, did better than challengers lacking such experience. See Melinda Gann Hall & Chris W. Bonneau, *Does Quality Matter? Challengers in State Supreme Court Elections*, 50 AM. J. POL. SCI. 20, 29-30 (2006). I suspect that this difference primarily reflected name recognition that challengers had achieved through their prior experience.

53. V.O. KEY, JR., *SOUTHERN POLITICS* 37-41 (1949). At least one study has applied the idea of friends and neighbors politics to judicial elections. See Larry T. Aspin & William K. Hall, *Friends and Neighbors Voting in Judicial Retention Elections: A Research Note Comparing Trial and Appellate Court Elections*, 42 W. POL. Q. 587 (1989). The idea was also used in a study of

The power of name recognition is most evident when it is wrong. In 1990, Chief Justice Keith Callow ran for reelection to the Washington Supreme Court.<sup>54</sup> An unknown local lawyer, believing that no election should go uncontested, entered the contest. Much to everyone's surprise, the challenger won. How did this happen? First, Washington has a nonpartisan system for electing members of the state supreme court. All candidates must run in the primary, even if there are only two candidates. If a candidate gets a majority in the primary, he or she is deemed the winner and need not run in the general election. This means that all two-candidate elections are resolved in the September primary, when the turnout is lower and the electorate is less engaged than in the November general election. Justice Callow lost in the primary. Second, the unknown lawyer who defeated Justice Callow was named Charles W. Johnson. At the time there were three relatively well-known Charles Johnsons in the state: "[A] Tacoma television anchor, a former sergeant-at-arms of the State Senate and a Superior Court judge."<sup>55</sup> Presumably, many voters mistook Charles W. Johnson for one of these other Charles Johnsons.

A dramatic example of name confusion came in a 1976 election for the Texas Supreme Court.<sup>56</sup> At that time, Texas was still a one-party Democratic state as far as the courts were concerned.<sup>57</sup> This meant that the real election for the supreme court came in the Democratic primary. The 1976 primary was somewhat unusual because it was for an open seat; no incumbent was running in the election.<sup>58</sup> Charles Barrow's candidacy was backed by the Democratic Party establishment; he was a well-regarded court of civil appeals judge from San Antonio.<sup>59</sup>

However, an unknown Houston lawyer named Don Yarbrough danced into the election. Yarbrough had made an election bid the prior year, but that was the limit of his political experience.<sup>60</sup> Yarbrough stunned the Texas establishment by winning the primary with

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judicial elections in Ohio. See Kathleen L. Barber, *Ohio Judicial Elections—Nonpartisan Premises with Partisan Results*, 32 OHIO ST. L.J. 762, 779–80 (1971).

54. Robb London, *For Want of Recognition, Chief Justice Is Ousted*, N.Y. TIMES, Sept. 28, 1990, at B16.

55. *Id.*

56. Paul Holder, *That's Yarbrough—Spelled with One "O": A Study of Judicial Misbehavior in Texas*, in PRACTICING TEXAS POLITICS 447 (Eugene W. Jones et al. eds., 4th ed. 1980).

57. *Id.* at 451.

58. *Id.* at 450. The vacancy arose because the man appointed to the seat the prior year, who had previously served as a trial judge, announced that he would retire. *Id.* He was eligible to retire, and his retirement pension would be based on the higher supreme court salary. *Id.*

59. *Id.*

60. Holder, *supra* note 56, at 450.

60% of the vote.<sup>61</sup> The explanation was voter confusion. Don Yarbrough (note the two "o's") had sought the governor's office three times in the 1960s, and Ralph Yarbrough represented Texas in the U.S. Senate for many years.

This being Texas, the story is not over. After Yarbrough donned the judicial robes, he asked the people of Texas for their prayers and announced that God had told him to run for the Texas Supreme Court.<sup>62</sup> This statement prompted a political cartoon showing a caricature of Yarbrough (Figure 4). In the wake of Yarbrough's election to the supreme court, it came out that there were disbarment proceedings pending against him for allegedly committing a host of ethics violations. During his early months on the court, the number of charges mushroomed.<sup>63</sup> More importantly, in May and June of 1977, Yarbrough was caught on tape plotting to kill a former business associate and making a variety of incriminating statements.<sup>64</sup> On July 15, Yarbrough resigned.<sup>65</sup> Yarbrough was subsequently tried and convicted on perjury charges and sentenced to prison. He appealed unsuccessfully to the Texas Court of Criminal Appeals, and when it was time for him to begin his sentence, he failed to appear and refused to return to the United States from the island of Grenada, where he had gone with the court's permission to study medicine. Finally, in 1983, while attending classes on St. Vincent, a country with which the United States has an extradition treaty, Yarbrough was arrested, flown immediately to St. Thomas, and then back to Texas.<sup>66</sup> In July 1983, Yarbrough was sentenced to seven years for bail-jumping, a sentence which ran concurrently with his shorter sentence for perjury.

Name recognition not resulting from mistake or confusion can also work to a candidate's advantage. For example, open-seat elections for the Minnesota Supreme Court are extremely rare; there have been only three such elections in the last sixty years.<sup>67</sup> The most recent was

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61. *Id.* at 450-51.

62. Yarbrough spoke to reporters: "It got to the point where it was so plain and so clear it was like—it wasn't a normal voice—but the longer it went, the plainer it got, and it got down to 'You run for the Supreme Court.'" *Id.* at 450.

63. Under Texas law, disbarment would not have disqualified Yarbrough from serving on the state supreme court. *Id.* at 452.

64. *Id.* at 448.

65. The Governor of Texas promptly announced that he would appoint Charles Barrow, the man Yarbrough defeated in the primary, to the now-vacant seat on the Texas Supreme Court. *Id.* at 452.

66. *Texas Fugitive Hustled from Virgin Islands*, MIAMI HERALD, Mar. 19, 1983, at 8D.

67. Not only are open-seat elections in Minnesota rare, but incumbent losses are essentially unheard of. With the exception of one justice who was appointed a few months before the election, the last time an incumbent member of the Minnesota Supreme Court was defeated in a

FIGURE 4: THAT'S YARBROUGH—SPELLED WITH ONE O



SARGENT © 1977 Austin American-Statesman. Reprinted with permission of UNIVERSAL PRESS SYNDICATE. All rights reserved.

in 1992, when Alan Page defeated Kevin Johnson for a vacant seat on the Minnesota Supreme Court.<sup>68</sup> At the time of the election, Johnson

reelection bid was over 100 years ago in 1900. Sally Kenney, *Meaning, Emotions, and Symbols: Mobilizing for Women Judges* 8 (2003) (unpublished manuscript presented at the 2003 Annual Meeting of the Law & Society Ass'n in Pittsburgh, Pennsylvania) (on file with author). Thus, only one Minnesota Supreme Court justice has been defeated since Minnesota adopted nonpartisan elections in 1912. This is not to say that sitting justices have not been subject to significant challenges. For example, in 1978, incumbent Justice C. Donald Peterson was challenged by a gay rights activist in the wake of a court ruling that refused to recognize same-sex marriage. *Id.* at 16. In 1996, Justices Edward Stringer and Paul Anderson were challenged by opponents who were endorsed by a state right-to-life organization. See Philip Kronebusch, *Minnesota Courts: Basic Structures, Processes, and Policies* 28 (undated, unpublished manuscript) (on file with author).

68. The 1992 open-seat election occurred in spite of an effort to prevent it from happening. The governor attempted to extend the incumbent's term for two years, at the incumbent's request, so he would be able to retire at age seventy on a full retirement pension. Kronebusch,



was an assistant county attorney who had previously challenged the younger Hubert Humphrey (also known as Skip Humphrey) for state attorney general, and Page was serving as an assistant attorney general. Page walked away with the election with 62% of the vote.<sup>69</sup> One explanation for Page's success is that he was well known in Minnesota as a former star defensive player on the Minnesota Vikings in the 1960s and 1970s. In fact, about four years before running for the Minnesota Supreme Court, he was inducted into the Pro Football Hall of Fame.<sup>70</sup> It also probably did not hurt Page that he was known by many to be a Democrat, while his opponent Kevin Johnson was known to be a Republican; in 1992, Democrats ran strongly in the state level elections in Minnesota, with Bill Clinton at the head of a ticket garnering 58% of the two-party vote.<sup>71</sup>

While the examples of Charles Johnson, Don Yarbrough, and Alan Page dramatically demonstrate how a recognized name can work to a candidate's advantage,<sup>72</sup> names can also work to a candidate's disadvantage. In June 2006, the legal community in Los Angeles was surprised by the defeat of a highly regarded veteran of the California Superior Court. Judge Dzintra Janavs, who had served for twenty years, lost to Lynn Diane Olson. Olson had practiced law for four years from 1988 to 1992 before leaving practice to open a bagel shop with her husband; it was not until 2005 that she even reactivated her bar membership.<sup>73</sup> Janavs was rated "exceptionally well qualified" by

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*supra* note 67, at 30. Page filed suit challenging the governor's action. *Id.* When the case got to the Minnesota Supreme Court, all seven justices recused themselves, and a special ad hoc supreme court, consisting of seven retired judges, heard the case and returned a decision striking down the governor's action. *Id.* The election went forward, and it was too late for the incumbent to file as a candidate; Alan Page won the election. *Id.*

69. THE MINNESOTA LEGISLATIVE MANUAL 1993–1994, at 358–59 (1993).

70. Pro Football Hall of Fame, Alan Page, [http://www.profootballhof.com/hof/member.jsp?player\\_id=171](http://www.profootballhof.com/hof/member.jsp?player_id=171) (last visited Jan. 27, 2007).

71. For the three candidate vote, Clinton received 44% of the vote with Bush getting 32% and Perot 24%. President Elect: 1992, <http://www.presidentelect.org/e1992.html#state> (last visited Jan. 27, 2007).

72. Name recognition does not necessarily help. The only other open-seat election for the Minnesota Supreme Court since 1946 occurred in 1966, when Justice Thomas Patrick Gallagher ran for the seat being vacated by his father, Thomas Francis Gallagher, who had won the previous open-seat election in 1946. *Foley v. Donovan*, 144 N.W.2d 600, 602 (Minn. 1966). Moreover, Gallagher was a name long associated with the Minnesota Supreme Court as Frank T. Gallagher had served on the court from 1947 to 1963 and Henry Gallagher had been Chief Justice from 1937 to 1944. Minnesota State Law Library Docket Series: Chronological List of Justices and Judges of the Minnesota Appellate Courts, <http://www.lawlibrary.state.mn.us/judges.html> (last visited Jan. 27, 2007). Nonetheless, Thomas Patrick Gallagher lost the 1966 election to Donald Peterson, a former Republican state legislator. *Id.*

73. Megan Garvey & Jessica Garrison, *Judge's Loss Stuns Experts*, L.A. TIMES, June 8, 2006, at B1.

the Los Angeles Bar Association—one of only two judicial candidates on the ballot with that rating—and was listed on the ballot as “judge of the Superior Court” (California permits ballot labels).<sup>74</sup> Olson was rated “not qualified” and was listed on the ballot as “attorney at law.” The interpretation of the outcome was that Judge Janavs was hurt by her foreign-sounding name. It probably did not help that Olson outspent her by a substantial margin. Further, while California trial court elections are nonpartisan, Janavs was known as a Republican in some quarters and this may have hurt her among some voters. In fact, Olson claimed that her decision to challenge Janavs and not one of the other sitting judges was “because of her political affiliation” and her “reputation for courtroom gruffness.”<sup>75</sup>

Although these are all interesting anecdotes, is there evidence that name recognition has more than an anecdotal impact? It does, as I will show below, and it relates to the problem of information and what we expect of voters.

#### D. Participation in Judicial Elections

One way to see that voters have difficulty with judicial elections is by examining voter participation in those elections. Turnout for elections in the United States is generally low, particularly outside the surge years of presidential elections.<sup>76</sup> Few people would expect a large turnout for an election if the only races on the ballot were judicial, whether state or local. Unsurprisingly, the level of turnout for judicial elections depends on what else is on the ballot. It also depends on whether the judicial election is a partisan, nonpartisan, or retention election. One study of state supreme court elections from 1948 through 1974 dramatically illustrated these effects.<sup>77</sup> As shown in Figure 5, turnout declines sharply as one goes from presidential to mid-term to off-year or off-season elections, and as one goes from partisan to nonpartisan to retention elections.

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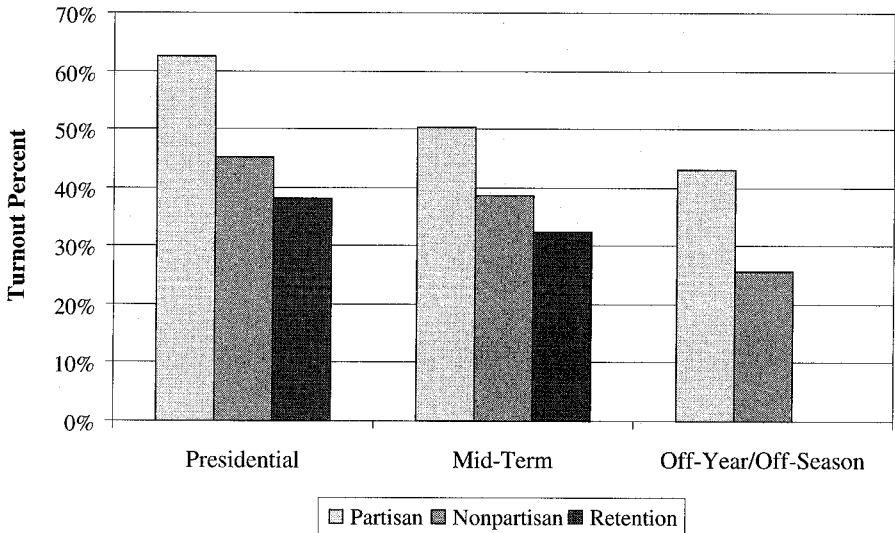
74. *Id.*

75. *Id.*

76. See generally Angus Campbell, *Surge and Decline: A Study of Electoral Change*, 24 PUB. OPINION Q. 397 (1960). For a discussion of the low level of turnout in the United States, see G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 AM. POL. SCI. REV. 17 (1986).

77. PHILIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* (1980) [hereinafter DUBOIS, *FROM BALLOT TO BENCH*]; Philip L. Dubois, *Voter Turnout in State Judicial Elections: An Analysis of the Tail on the Electoral Kite*, 41 J. POL. 865 (1979) [hereinafter Dubois, *Voter Turnout in State Judicial Elections*].

FIGURE 5: TURNOUT IN STATE SUPREME COURT ELECTIONS, 1948–1974<sup>78</sup>

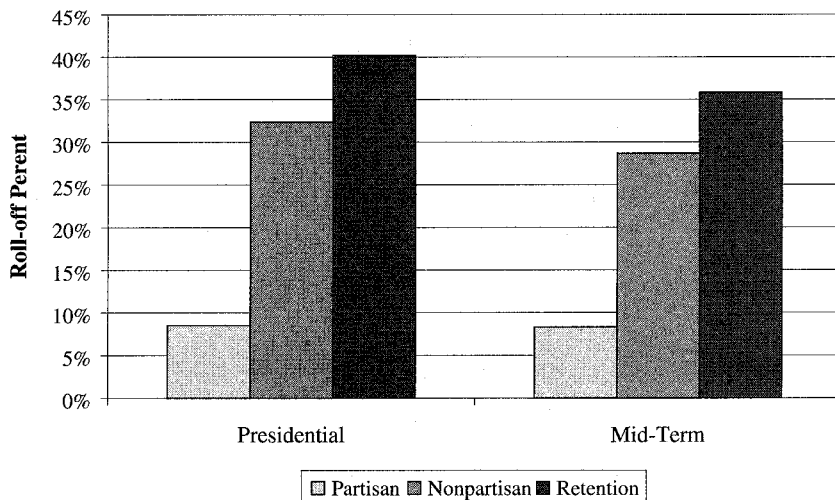


More importantly, even those voters who do come to the polls often skip over the judicial elections—a phenomenon known as “roll-off.”<sup>79</sup> Figure 6 shows the roll-off percentages for the same period. A recent study provides another look at the roll-off question for the period from 1980 to 1994, with the averages for partisan, nonpartisan, and retention at 21%, 27%, and 30%, respectively.<sup>80</sup> These figures are higher for partisan elections and lower for nonpartisan and retention elections than those for the earlier period. However, this difference probably reflects in significant part the inclusion of uncontested partisan and nonpartisan elections in the more recent data, but not in the earlier study.

78. DUBOIS, FROM BALLOT TO BENCH, *supra* note 77, tbl.1 at 46.

79. Dubois, *Voter Turnout in State Judicial Elections*, *supra* note 77, at 872.

80. See Melinda Gann Hall, *Mobilizing Voters in State Supreme Court Elections: Competition and Other Contextual Forces as Democratic Incentives* 35 (May 19–20, 2006) (unpublished manuscript presented at the Sixth Annual State Politics and Policy Conference, Texas Tech University), [http://www.depts.ttu.edu/politicalscience/2006conference/2006conference\\_program.htm](http://www.depts.ttu.edu/politicalscience/2006conference/2006conference_program.htm) [hereinafter Hall, *Mobilizing Voters*]. Note that because of the information reported in the paper, my computations omit states that either changed selection method or use a combination of types of elections.

FIGURE 6: ROLL-OFF IN STATE SUPREME COURT ELECTIONS, 1948–1974<sup>81</sup>

### E. Competition in Judicial Elections

Many commentators have criticized the increased participation of interest groups in judicial elections, particularly in state supreme court elections.<sup>82</sup> Whether such participation is positive or negative depends on your view of democratic politics. The primary way in which interest groups have influenced judicial elections is through campaign expenditures, either by their own direct expenditures or by donating money to candidates. A significant portion of these expenditures is devoted to television advertising, as shown by information compiled by the Brennan Center for Justice at New York University.<sup>83</sup> The Brennan Center reports that the number of states with supreme court elections allowing television advertising increased from 4 in 2000 to 9

81. DUBOIS, FROM BALLOT TO BENCH, *supra* note 77, tbl.2 at 48.

82. For a sampling of this commentary, see Justice at Stake Campaign, <http://www.justiceatstake.org> (last visited Jan. 27, 2007); see also Mike France & Lorraine Woellert, *The Battle over the Courts*, BUS. WK., Sept. 27, 2004, at 36; William Glaberson, *A Bipartisan Effort to Remove Politics from Judicial Races*, N.Y. TIMES, Oct. 23, 2000, at A18; Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, at A1; *My Judge Is a Party Animal*, ECONOMIST, Jan. 1, 2005, at 20.

83. Deborah Goldberg et al., *The New Politics of Judicial Elections 2004: How Special Interest Pressure on Our Courts Has Reached a "Tipping Point"—And How to Keep Our Courts Fair and Impartial 2* (2005), available at <http://faircourts.org/files/NewPoliticsReport2004.pdf>; see also Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21 (2004); Chris W. Bonneau, *What Price Justice(s)? Understanding Campaign Spending in State Supreme Court Elections*, 5 ST. POL. & POL'Y Q. 107 (2005).

in 2002 to 15 in 2004. In 2006 television advertising was used in 10 of the 11 states with contested supreme court elections.<sup>84</sup>

Competition in state supreme court elections has increased over the last quarter century. Figure 7 shows the pattern of competition from 1980 through 2006. The likelihood that an incumbent running in a state supreme court election will be challenged has increased 33%. In some ways, this figure may underestimate the trend, because there has been a shift away from partisan elections to nonpartisan elections.<sup>85</sup> In the 1980s, the number of partisan elections for state supreme court seats was almost equal to the number of nonpartisan elections. By 2000, over 70% of the elections were nonpartisan.<sup>86</sup> The percentage of nonpartisan elections that were contested increased from 42% to 65%, while the percentage of partisan elections, which was higher to begin with, increased from 56% to 79% in the 1990s; it has now fallen back to 67% for the period from 2000 to 2006.<sup>87</sup> This last point is curious and may reflect an aberration. As shown in Figure 7, the percentage of contested partisan elections in 2006 was only 36%, reflecting in significant part that only two of the eight incumbents running for reelection in Texas faced challengers. Interestingly, it appears that over the last twenty years, Texas has essentially moved from a one-party Democratic state for purposes of elections to the state's highest courts, to a virtually one-party Republican state, with Democrats less and less inclined to challenge Republicans for those seats.

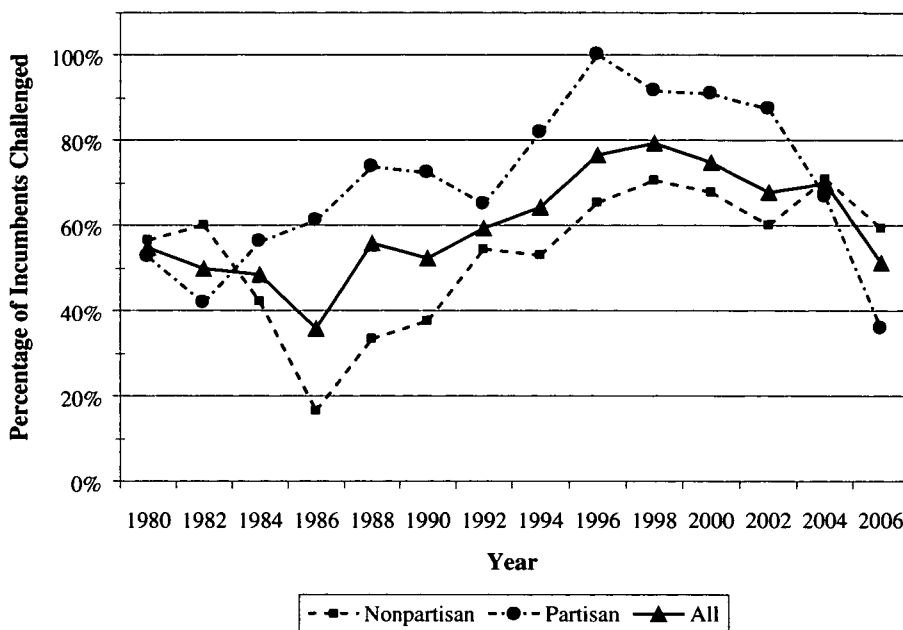
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84. *Despite Big Spending, Interest Groups Don't Run Table on Judicial Elections*, EYES ON JUSTICE: THE JUSTICE AT STAKE CAMPAIGN NEWSLETTER (Nov. 22, 2006), <http://justiceatstake.org/JASnews/22Nov06.htm>.

85. Bonneau and Hall found that whether the election was partisan or nonpartisan was one factor predicting the likelihood of an incumbent state supreme court justice being challenged; other factors that predicted challenges were whether the incumbent had been appointed to fill a vacancy and was running for election for the first time, whether the justices were elected in districts (rather than statewide), the general level of political competition in the state, salary, term length, and the number of lawyers in the state. Chris W. Bonneau & Melinda Gann Hall, *Predicting Challengers in State Supreme Court Elections: Context and the Politics of Institutional Design*, 56 POL. RES. Q. 337 tbl.1 at 342 (2003).

86. Much of this reflected changes in the formerly one-party Democratic Southern states, which effectively had nonpartisan elections because of the failure of Republicans to contest most elections generally, and judicial elections specifically. Dubois studied state supreme court elections outside the South for the period 1948 through 1974; about 70% of the elections in his study were nonpartisan. DUBOIS, FROM BALLOT TO BENCH, *supra* note 77, tbl.3 at 50.

87. In his study of supreme court elections outside the South for the period from 1948 to 1974, Dubois found that 87% of partisan and 49% of nonpartisan elections were contested. *Id.* Because he did not consider competition in primary elections, his figures may underestimate the level of competition. When I recompute the percentages adding in contested primaries in three nonpartisan states (Washington, Oregon, and Idaho), the percentage of nonpartisan elections that were contested rises to 57%. This suggests that there may actually have been a dip in competition in the late 1970s through the 1980s.

FIGURE 7: CHALLENGERS IN STATE SUPREME COURT ELECTIONS, 1980–2006<sup>88</sup>

While challenges to incumbents have increased over the last quarter century, incumbents still win most races. Professor Melinda Gann Hall found that only 41 of 307 state supreme court justices (13%) who ran for reelection in nonpartisan or partisan systems between 1980 and 1994 were defeated.<sup>89</sup> Based on information provided by Justice at Stake, only 3 out of 37 incumbents (8%) were defeated from 2002 to 2004 in partisan or nonpartisan election states.<sup>90</sup> Part of this apparent decline probably reflects the shift toward nonpartisan elections.

88. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315 tbl.1 at 317 (2001); updated information through 2000 provided by Professor Hall; additional updated information from Justice at Stake Campaign, 2002 State Supreme Court Elections and Opponents, <http://www.justiceatstake.org/files/Elections&Opponents.pdf> (last visited Jan. 27, 2007); Justice at Stake Campaign, 2004 State Supreme Court Election Results, <http://www.justiceatstake.org/files/ElectionChart2004RESULTS.pdf> (last visited Jan. 27, 2007); and Justice at Stake Campaign, 2006 State Supreme Court Elections, <http://www.justiceatstake.org/files/2006ElectionResults.pdf> (last visited Jan. 27, 2007).

89. See Hall, *Mobilizing Voters*, *supra* note 80, tbl.1 at 35. Bonneau found that between 1990 and 2000, only 15.4% of incumbents were defeated. Chris W. Bonneau, *Electoral Verdicts: Incumbent Defeats in State Supreme Court Elections*, 33 AM. POL. RES. 818 tbl.1 at 823 (2005) [hereinafter Bonneau, *Electoral Verdicts*].

90. Justice at Stake Campaign, 2002 State Supreme Court Elections and Opponents, *supra* note 88; Justice at Stake Campaign, 2004 State Supreme Court Election Results, *supra* note 88.

Hall found that 9% of incumbents were defeated in nonpartisan states versus 19% in partisan states.<sup>91</sup> Incumbents are much less likely to be defeated in retention elections: less than 2% of incumbents were defeated between 1980 and 1994.<sup>92</sup> In fact, the raw numbers show that only 4 of the 234 state supreme court justices standing for retention during this period were defeated, and 3 of those were in the 1986 California election in which Chief Justice Rose Bird, Justice Joseph Grodin, and Justice Cruz Reynoso were targeted for their apparent opposition to the death penalty.<sup>93</sup> Two additional justices lost retention elections between 1994 and 2000: Justice Penny White in Tennessee and Justice David Lanphier in Nebraska, both in 1996.<sup>94</sup> From 2001 through 2006, 68 state supreme court justices faced retention elections; only Russell M. Nigro in Pennsylvania (2005) was not retained.<sup>95</sup>

Leaving aside the retention elections, one might ask whether the success of incumbents in state supreme court elections is unique? The answer is a resounding no. Incumbents in American elections enjoy a high degree of success. For purposes of comparison, Hall summarized research on the success rates for incumbents running for reelection to the United States House of Representatives, state senates, and state assemblies. The research she found reported success rates of 94%, 90%, and 92% for incumbents of the U.S. House, state senates, and state assemblies, respectively.<sup>96</sup> The incumbency advantage has been

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91. Hall, *Mobilizing Voters*, *supra* note 80, tbl.1 at 35.

92. *Id.* tbls.1–4 at 35–38.

93. See JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE (1989); John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81 (1986); Joseph R. Grodin, *Judicial Elections: The California Experience*, 70 JUDICATURE 365 (1987); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987). The fourth state supreme court justice turned out of office on a retention vote during this period was Wyoming Supreme Court Justice Walter Urbigkit in 1992 (my thanks to Melinda Gann Hall for providing this information). The only information I could locate indicates that he was opposed for retention on the grounds that he was “soft on crime.” See USA TODAY, Oct. 23, 1992, at 11A.

94. Traciell V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 68 (1999).

95. Justice at Stake Campaign, 2002 State Supreme Court Elections and Opponents, *supra* note 88; Justice at Stake Campaign, 2004 State Supreme Court Election Results, *supra* note 88; Justice at Stake Campaign, 2006 State Supreme Court Election Results, *supra* note 88. Two of the 68 elections occurred in 2005, and are not listed in the Justice at Stake reports. Only one other state supreme court justice, Harry Arend of Alaska in 1964, has been defeated in a retention election (my thanks to Larry Aspin for this information). See Randy M. Olsen, *Harry O. Arend: Alaska Bar Controversy Claims First Judge*, <http://www.alaskabar.org/INDEX.CFM?ID=6181&makeback=true> (last visited Jan. 27, 2007).

96. Hall, *Mobilizing Voters*, *supra* note 80, tbl.1 at 35.

rising in the United States, and that is probably true for state supreme court justices as well. Professor Philip Dubois reported that out of a total of 529 non-Southern judicial elections between 1948 and 1974—a fraction of which were open-seat elections and therefore no incumbent ran for reelection—58 state supreme court justices were defeated for reelection.<sup>97</sup> This means that at least 11% of incumbents were defeated. Hall found that about 25% of state supreme court elections between 1980 and 1994 were open-seat elections;<sup>98</sup> if one assumes the same percentage for the 1948 to 1974 period, this would indicate that about 15% of non-Southern incumbents running for reelection in partisan and nonpartisan elections were defeated in the earlier period, which is only slightly more than what Hall found from 1980 to 1994.<sup>99</sup>

Fewer studies report results from electoral challenges to state court judges below the supreme court level. I compiled data for Wisconsin for the period 1998 to 2005.<sup>100</sup> During this time, incumbents stood for reelection 25 times for the Wisconsin Court of Appeals and 314 times for the Wisconsin Circuit Court. Two appeals court judges were opposed, one of whom was defeated; 33 circuit court judges were opposed, with 5 being turned out of office. Thus, only about 10% of these lower court judges were opposed in their reelection bids, and only 4% of incumbent appeals court judges and 1.6% of trial court judges running for reelection, were defeated. While the numbers will vary from state to state, it would be surprising if there were sharp differences in more than a few states.

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97. DUBOIS, FROM BALLOT TO BENCH, *supra* note 77, tbl.13 at 109.

98. Hall, *Mobilizing Voters*, *supra* note 80, at 13, tbls.2–4 at 36–38. Actually, this figure may be slightly overstated because Dubois reports some information for defeats in primaries, but does not count in his larger study primary elections where a candidate received more than 50% of the votes and did not then have to stand in the general election.

99. There is extensive political science literature on the growth of incumbency advantage in legislative elections. The explanations for this growth center on districting to protect incumbents, and the advantages incumbents have in serving constituents. See, e.g., John R. Alford & John R. Hibbing, *Increased Incumbency Advantage in the House*, 43 J. POL. 1042 (1981); John M. Carey et al., *Incumbency and the Probability of Reelection in State Legislative Elections*, 62 J. POL. 671 (2000); Gary W. Cox & Jonathan N. Katz, *Why Did the Incumbency Advantage in U.S. House Elections Grow?*, 40 AM. J. POL. SCI. 478 (1996); Scott W. Desposato & John R. Petrocik, *The Variable Incumbency Advantage: New Voters, Redistricting, and the Personal Vote*, 47 AM. J. POL. SCI. 18 (2003); Keith Krehbiel & John R. Wright, *The Incumbency Effect in Congressional Elections: A Test of Two Explanations*, 27 AM. J. POL. SCI. 140 (1983). Importantly, neither of these factors should be relevant in judicial elections. Bonneau analyzed the incumbent defeats between 1990 and 2000, and found they were most likely for an incumbent standing for election for the first time after being appointed to fill a vacancy, in partisan elections, and in states that chose justices in districts rather than statewide. See Bonneau, *Electoral Verdicts*, *supra* note 89, at 833–34, 836–37.

100. I used this period because it was not until 1998 that the *Wisconsin Blue Book* indicated whether a candidate was an incumbent.



One scholar's studies of retention elections for all levels of courts between 1964 and 2004 assembled information on a total of 5894 such elections.<sup>101</sup> In only 55 (0.9%) were the judges not retained in office; in 99.1% of elections, the judges were retained.<sup>102</sup> Importantly, 29 of the 55 elections where judges were not retained were in Illinois, which requires a 60% vote for retention.<sup>103</sup> Of the 29 judges not retained in Illinois, 28 obtained more than a 50% "yes" vote. Thus, in less than 0.5% of retention elections was there less than a majority of voters in favor of retaining the judge in office.<sup>104</sup>

With this very high retention rate, one is not going to find measurable change over time. However, another question is whether the percentage of persons voting to retain has changed over time. In fact, as Figure 8 shows, there is some decline in the percentage of voters casting "yes" votes in retention elections, dropping from around 84% in the 1960s to around 70% by the 1990s; by the end of the 1990s, however, "yes" votes had gone back up to 75%, a figure that has been stable over recent election cycles.

#### *F. Partisan Cues in State Supreme Court Elections*

Voters look for quick and easy information when they vote. Even as they bad-mouth political parties, voters rely heavily on partisan labels, even in judicial elections where partisanship would seem inconsistent with our ideal of an impartial judiciary. It should come as no surprise that when party labels are included on the ballot, voters use them in making their choices. One way to see this is to examine patterns in election returns. In a study that is now almost thirty-years old, Dubois adopted the methodology of comparing voting patterns in judicial elections to those in state partisan elections, with a specific

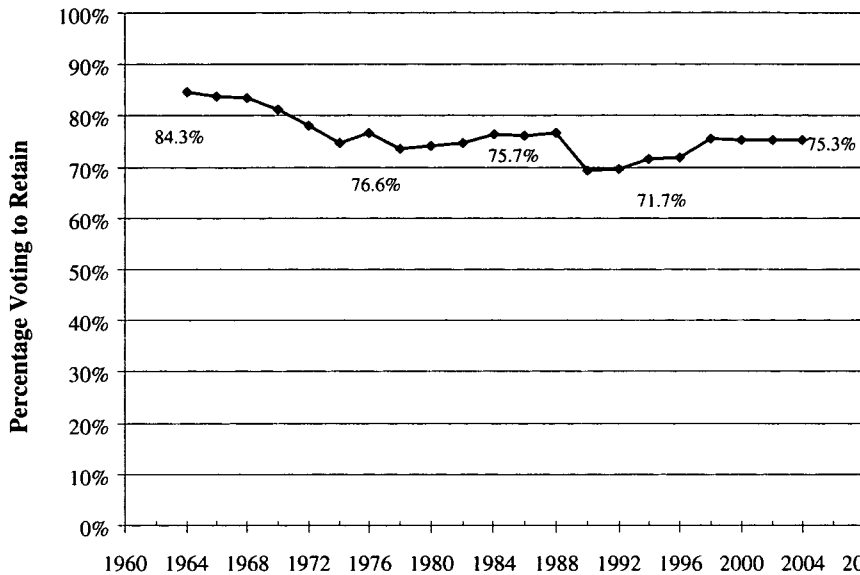
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101. Larry Aspin, *Trends in Judicial Retention Elections, 1964–1998*, 83 JUDICATURE 79, 79 (1999); Larry Aspin, *Judicial Retention Election Trends: 1964–2004: Updating and Expanding Information Previously Reported in "Trends in Judicial Retention Elections, 1964–1998,"* (undated, unpublished manuscript) (on file with author) [hereinafter Aspin, *Judicial Retention Election Trends: 1964–2004*] (providing information from 2000 to 2004).

102. Aspin, *Judicial Retention Election Trends: 1964–2004*, *supra* note 101, at 2.

103. *Id.*

104. *Id.* Aspin notes that ten of the defeats in Illinois came in a single year. *Id.*

FIGURE 8: MEAN PERCENTAGE VOTE FOR RETENTION 1964–2004<sup>105</sup>

focus on gubernatorial elections.<sup>106</sup> Specifically, Dubois looked to see if the pattern of support at the county level moved in similar or different ways for gubernatorial and judicial elections. He did this by correlating the percentage of the electorate voting for the Democratic candidate in the most recent gubernatorial election to the percentage voting for identifiably Democratic candidates in state supreme court elections.<sup>107</sup> Dubois omitted from his analysis any elections where the two candidates did not differ in their party affiliation.<sup>108</sup> Because of the period he considered, 1948 through 1974, Dubois omitted from his analysis Southern states where the elections were effectively decided in Democratic Party primaries. His findings were striking.

When Dubois looked at the states with partisan elections, he found that the average correlation across the 139 elections in his data set was 0.85.<sup>109</sup> Importantly, with the exception of one state, New Mexico, the

105. Larry Aspin, *Trends in Judicial Retention Elections, 1964–1998*, *supra* note 101; Larry Aspin, *Judicial Retention Election Trends: 1964–2004*, *supra* note 101.

106. DUBOIS, *FROM BALLOT TO BENCH*, *supra* note 77, at 64–100. In fact, Dubois was not the first to do this for judicial elections. The methodology was employed in an earlier study of Ohio state supreme court elections. See Barber, *supra* note 53.

107. DUBOIS, *FROM BALLOT TO BENCH*, *supra* note 77, at 64–100.

108. *Id.* at 73–74.

109. *Id.* tbl.10 at 75. The nine partisan states Dubois examined were West Virginia, Indiana, Pennsylvania, New York, Iowa, Colorado, Kansas, Utah, and New Mexico. Some of these states changed selection methods during the period of Dubois's study and are included only for the relevant years. More detailed results, including correlations for individual elections, can be found in Dubois's University of Wisconsin doctoral dissertation. Philip L. Dubois, *Judicial Elec-*

minimum correlation in the nine states Dubois analyzed was 0.64.<sup>110</sup> Because he considered only elections where opposing candidates were associated with different parties, Dubois looked at a subset of 62 (about 60%) of the nonpartisan elections.<sup>111</sup> The average correlation he found for the nine nonpartisan states in his analysis was only 0.24, and the range of correlations was much broader, from a low of -0.49 to a high of 0.74.<sup>112</sup> Finally, Dubois did a similar calculation for three states—Ohio, Michigan, and Arizona—that used mixed systems allowing parties to nominate candidates but did not list party affiliation on the general election ballot.<sup>113</sup> The mean correlation for the 75 elections in these three states was 0.44, with a range as high as 0.81 and as low as -0.42.<sup>114</sup>

I have updated Dubois's analysis by assembling some contemporary data of the type he employed. I have compiled data for nine states: Alabama, Texas, West Virginia, Minnesota, Wisconsin, Washington,<sup>115</sup> Michigan, Pennsylvania, and Ohio.<sup>116</sup> At this time, I have not been able to identify partisan connections for candidates in nonpartisan states as Dubois did.<sup>117</sup>

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tions in the States: Patterns and Consequences tbl.3 at 143–45 (1978) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (on file with author) [hereinafter Dubois, Judicial Elections in the States].

110. DUBOIS, FROM BALLOT TO BENCH, *supra* note 77, tbl.10 at 75.

111. *Id.*

112. *Id.* The nonpartisan states in the calculation above include Montana, Minnesota, Nevada, Utah, Washington, Wisconsin, Wyoming, North Dakota, and Idaho. Dubois omitted the one election that met his criteria in Oregon. He also did not include results from Washington, Oregon, and Idaho where a candidate won a majority of the vote in the primary and did not have to run in November. For a discussion of the implication of the negative correlation, see *infra* notes 168–170 and accompanying text.

113. DUBOIS, FROM BALLOT TO BENCH, *supra* note 77, at 71. Ohio relies on party primaries, while in Michigan parties nominate candidates at state conventions. Arizona, which changed to a merit plan in the 1970s, used party primaries.

114. *Id.* tbl.10 at 75.

115. For Washington, I have also added data for primary elections in which a candidate garnered a majority and did not have to run in the subsequent general election. Data for one election in Washington, the 1948 primary election, could not be located by the Washington Secretary of State's office; that election is omitted from the analysis.

116. I assembled this data from a variety of sources depending on where the authority for overseeing elections resides in a given state. For most states this is the Secretary of State's office; some states have a separate unit to oversee elections (e.g., in Wisconsin it is the State Elections Board). In several cases, election tabulations were provided by state archives.

117. One other distinction in my analysis compared to Dubois's is that when a judicial election did not fall during the year of a gubernatorial election, I averaged the results for preceding and following elections (except for elections in 2004 because I did not have the 2006 results available). If an election fell on an odd year so that it was not in the middle year between gubernatorial elections, I used a weighted average of the gubernatorial elections, counting the more recent election more heavily than the more remote election. In all of my calculations, I focused only on the votes for the two main parties—or two main candidates in the case of judicial elections.

### 1. States Using Partisan Elections

The four partisan states I analyzed are Texas (60 elections, 1980–2006),<sup>118</sup> Pennsylvania (21 elections, 1946–2006),<sup>119</sup> West Virginia (31 elections, 1946–2006), and Alabama (28 elections, 1988–2006).<sup>120</sup> The average correlations in the four states are 0.881 (Texas), 0.874 (Pennsylvania), 0.865 (West Virginia), and 0.877 (Alabama). Across all four states the average is 0.876, which is only slightly higher than the average Dubois reported (0.85).<sup>121</sup>

The correlations for all of these elections are shown in Figure 9. All but four of the correlations exceed 0.7, and only one falls below 0.5; the highest is 0.977. I have included in Figure 9 a line connecting the averages for each even-numbered year.<sup>122</sup> The typical correlations for Pennsylvania and West Virginia were higher pre-1960 than for the four states in recent years. There was something of a drop starting around 1960, although the plunge in the early 1970s is a quirk of a small number of elections. This line suggests that the correlation rose during the 1990s.

The extremely low correlation is worth examining. That correlation was 0.260, and is from an election in Alabama in 1988 for the seat of chief justice. The election pitted sitting Justice Gorman Houston against Sonny Hornsby. Houston had been appointed to the court in 1985 and won reelection as a Democrat in 1986 (surviving a challenge in the Democratic primary that year, but unopposed in November). In 1988, he ran for chief justice as a Republican, having announced his party conversion while serving on the court, and lost to Sonny Hornsby, who ran as a Democrat. Voters, who only two years before had

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118. In recent years, Democrats have allowed Republicans to run unopposed for the two Texas courts of last resort; in some elections Republicans have been opposed by candidates from the Libertarian Party. I have not included the Libertarian Party candidates in my analyses. On the politics of judicial selection in Texas, see KYLE CHEEK & ANTHONY CHAMPAGNE, *JUDICIAL POLITICS IN TEXAS: PARTISANSHIP, MONEY, AND POLITICS IN STATE COURTS* (2005); SHELDON & MAULE, *supra* note 27, at 73–85; and Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184 (1991).

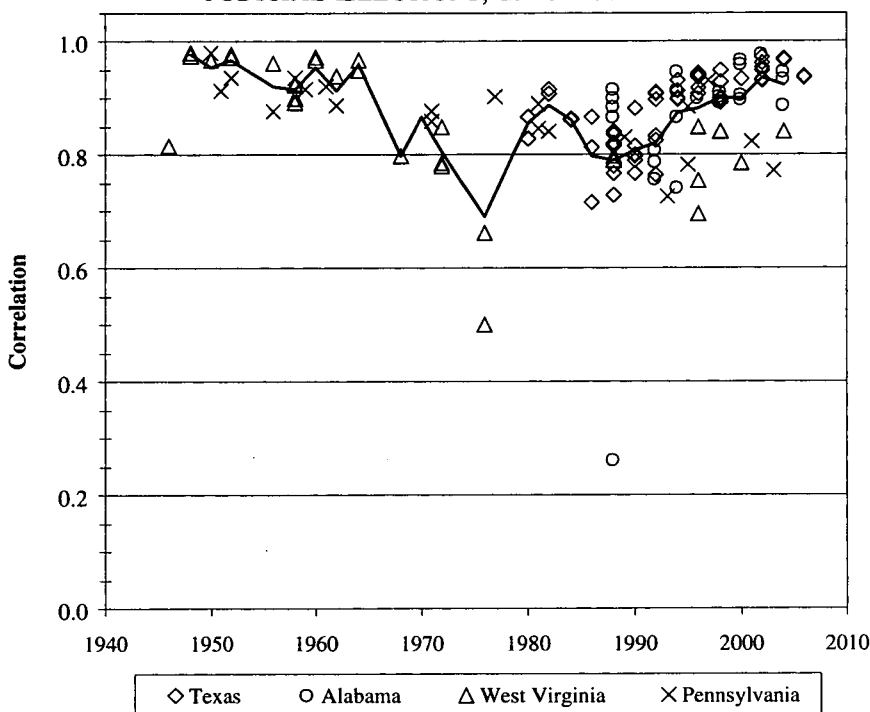
119. Since the mid-1970s, Pennsylvania has used partisan elections only for open seats; incumbents stand for retention.

120. Three other states use partisan elections, at least in some way. In Illinois and Louisiana, supreme court justices are chosen by districts, which precludes the kind of analysis I am presenting here. In New Mexico, after a vacancy is filled by gubernatorial appointment, the first election is conducted as a partisan contest, with justices then standing for retention at the completion of each term. See *supra* notes 30–32 and accompanying text.

121. Dubois, *Judicial Elections in the States*, *supra* note 109, tbl.3 at 144–45 (providing the correlations for 1948 to 1974 for West Virginia and Pennsylvania).

122. I included the Pennsylvania elections that occurred in odd-numbered years with the previous year in computing these averages.

FIGURE 9: PARTISAN VOTING PATTERNS IN STATES WITH PARTISAN JUDICIAL ELECTIONS, 1946–2004<sup>123</sup>



voted for Houston as a Democrat, may not have noticed the party label on the ballot and voted for the familiar name, whom many may have thought was a Democrat.

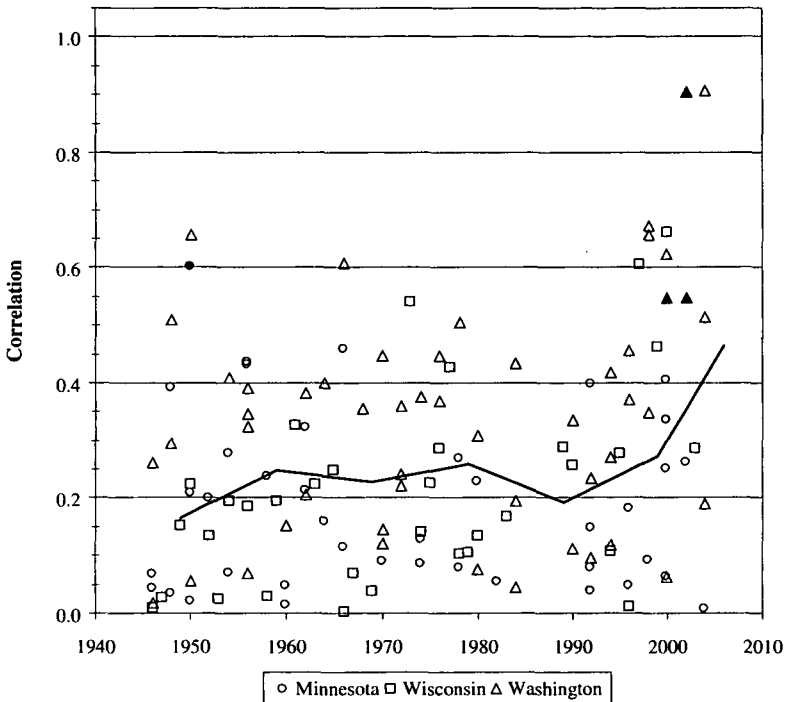
## 2. States Using Nonpartisan Elections

What happens when we look at elections in nonpartisan states? I have compiled data from Minnesota (1946–2006), Wisconsin (1946–2006), and Washington (1946–2006). I have included county-level data for every seat that was contested, not just those in which there were clear party links to both candidates (which is what Dubois did in his analysis). I also included primary elections in Washington in which a candidate won 50% or more of the vote, and thus did not have to face the voters in November.<sup>124</sup> I have data on a total of 129 elections in these three states. Because I have not sought to match the

123. For the period from 1948 to 1974, I used the correlations from Dubois, *Judicial Elections in the States*, *supra* note 109, tbl.3 at 143–45. I computed the 1946 and post-1974 correlations from data compiled from various sources, see *supra* note 116.

124. Because of this rule, a majority of contested judicial elections in Washington are decided in the primary election. See Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Voter Knowledge, Behavior and Attitudes in Primary and General Judicial Elections*, 82 JUDICATURE 216 (1999).

FIGURE 10: PARTISAN VOTING PATTERNS IN STATES WITH NONPARTISAN JUDICIAL ELECTIONS, 1946–2004



candidates with a political party, I consider only the absolute value of the correlations; I recomputed the average correlation for Dubois's data using absolute values, and obtained an average of 0.294 across a total of 62 elections.<sup>125</sup> The average over the three nonpartisan states for which I compiled data is 0.272.

While in states with partisan elections the correlations were so high that there was obviously a relationship, caution is warranted in considering the nonpartisan states. Specifically, even if no relationship exists between the voting patterns in gubernatorial elections and judicial elections, we would not expect the correlation to be exactly zero; rather, we would expect the correlation to vary randomly around zero (or, if we look only at absolute values, to vary randomly from zero). The question here is whether the pattern reflects random variation among the counties or a systematic relationship between voting patterns in one election and another. We can never answer this definitively, but standard statistical methods allow us to draw conclusions about whether or not a relationship deviates from that produced by a random process. The typical standard in statistical inference is to con-

125. See Dubois, *Judicial Elections in the States*, *supra* note 109, tbl.5 at 152–53.

clude that an observed relationship is not reflective of a random process if the chance of observing the statistic describing the relationship if it were random is less than one out of twenty (0.05); the cutoff value for the correlation depends on the number of observations (counties in this analysis). Wisconsin, Minnesota, and Washington have seventy-two, eighty-seven, and forty-one counties, respectively;<sup>126</sup> the relevant cutoff values for correlations from each of the states are 0.232, 0.211, and 0.310.<sup>127</sup>

Figure 10 shows a scatterplot for all of these correlations.<sup>128</sup> Overall, 47% are statistically significant (i.e., less than a one in twenty chance of being produced by a random process); for the individual states the corresponding figures are 40%, 35%, and 60% for Minnesota, Wisconsin, and Washington. There are some interesting patterns in Figure 10, and some anomalies worth noting. First, Washington stands out as having higher correlations than either Minnesota or Wisconsin, and Minnesota stands out as having lower correlations, particularly in the last ten to twenty years. Second, prior to 1985, relatively few of the correlations were above 0.4, and almost none were above 0.5. After 1985, two of the three states, Wisconsin and Washington, show substantial numbers of elections with correlations above 0.4, and several above 0.6, including three in Washington that exceed 0.9. This increase in typical correlations is confirmed by the line shown in Figure 10, which plots the decade averages. Through the 1990s, the averages fluctuated between 0.164 and 0.272; for the elections starting in 2000, the average increased to 0.464. Less clear in Figure 10 is the fact that the average in Minnesota has not increased, and is at 0.220 for the most recent years (compared to 0.184 between 1946 and 1998). In Washington, the increase in partisanship is particularly clear; in Minnesota, in contrast, it is difficult to argue that partisanship has increased.<sup>129</sup>

Let us look at some of the more partisan elections in each of the three states. In Minnesota, the most partisan election occurred back in 1950, when the correlation was 0.602. During the period covered by my data, there have been 72 elections for the Minnesota Supreme Court. Incumbents have stood for reelection in 69 of those elections

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126. Wisconsin had only seventy-one counties until 1970.

127. See HERBERT ARKIN & RAYMOND R. COLTON, *TABLES FOR STATISTICIANS* (1950).

128. I computed these correlations using data compiled from various sources, see *supra* note 116.

129. One might speculate that the lack of an increase in partisanship in Minnesota is somehow related to a failed effort to inject partisanship into judicial elections in Minnesota back in the 1930s. See Malcolm C. Moos, *Judicial Elections and Partisan Endorsement of Judicial Candidates in Minnesota*, 35 AM. POL. SCI. REV. 69, 71-73 (1941).

(there have been only 3 open-seat elections in the last sixty years); incumbents have faced an opponent in 38 elections, and only one incumbent has been defeated, no doubt due in significant part to Minnesota's practice of indicating incumbency on the ballot.<sup>130</sup> In 1950, incumbent Justice Theodore Christianson, who had been appointed to office the previous May, faced Mark Nolan. Nolan was a former state legislator and a Democratic activist, and Theodore Christianson bore the name of his father, a former Republican governor of the state.<sup>131</sup> Voters apparently linked the two judicial candidates to the Democratic and Republican parties.<sup>132</sup>

Wisconsin has a strong tradition of nonpartisanship in judicial elections and in judicial selection more generally.<sup>133</sup> Indicative of the non-partisan nature of the state supreme court elections was the 1983 open-seat election in which one of the candidates was the former Democratic majority leader in the state senate William Bablich; the correlation between the percentage vote for Bablitch and the Democratic vote for governor the preceding November (Wisconsin's judicial elections are held in April) was -0.167. Not until the last decade have there been signs of partisan divide in judicial elections, with two elections producing moderately strong partisan patterns. The strongest of these was in 2000, when Diane Sykes, who had been appointed to fill a vacancy by longtime Republican Governor Tommy Thompson, was

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130. MINN. STAT. ANN. § 204B.36 (West 1992) ("If a chief justice, associate justice, or judge is a candidate to succeed again, the word 'incumbent' shall be printed after that judge's name as a candidate."); see also Laura Benson, *The Minnesota Judicial Selection Process: Rejecting Judicial Elections in Favor of a Merit Plan*, 19 WM. MITCHELL L. REV. 765, 769 (1993).

131. See DUBOIS, FROM BALLOT TO BENCH, *supra* note 77, at 90. Dubois incorrectly identifies Justice Christianson as the former governor. For information on the governor, see Minnesota Historical Society, Governors of Minnesota, [http://www.mnhs.org/people/governors/gov/gov\\_23.htm](http://www.mnhs.org/people/governors/gov/gov_23.htm) (last visited Jan. 27, 2007).

132. See DUBOIS, FROM BALLOT TO BENCH, *supra* note 77, at 90. There are several elections in Minnesota where the correlation reaches 0.44 or 0.45; in at least two of these, there were clear partisan connections to the candidates (or at least the candidate's names). In one, an election in 1956, the incumbent had been appointed by the Democratic governor, and the challenger shared the last name of the previous Republican governor; it is worth noting that the other judicial election that year produced a virtually identical correlation even though there were no apparent partisan connections to the two candidates. In 1966 in a rare open-seat election, a man who had been an unsuccessful Democratic candidate for governor faced a man who had been a Republican legislator and an unsuccessful Republican candidate for lieutenant governor. An additional twist to this election was that the Democratic candidate was seeking to succeed his father who had the same name; trying to ride on his father's reputation was not a winning strategy, and the Republican candidate won, but with the smallest margin of any of the Minnesota elections in my data set. *Id.*

133. See David W. Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57, 69-72 (1969). For general information regarding Wisconsin judicial elections, see David Adamany & Philip Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731.



unsuccessfully challenged by Louis Butler, an African-American trial court judge from Milwaukee.<sup>134</sup> Sykes's Republican credentials were strengthened by the fact that she is the former wife of a popular conservative talk show host, newspaper columnist, and author, Charles Sykes.<sup>135</sup> The other election with a notable partisan pattern was in 1997, when another recent Thompson appointee, Jon Wilcox, was challenged by Walt Kelly, a lawyer who received strong backing from state labor organizations.<sup>136</sup> Interestingly, one of the most explicitly partisan elections, at least in the tone of the challenger's campaign, came in 1999, when challenger Sharren Rose attacked the record of incumbent Chief Justice Shirley Abrahamson as being too liberal.<sup>137</sup> While the correlation for this election, 0.463, was high by the norms of Wisconsin history, it was not as high as either the election just before it (Wilcox v. Kelly) or the election that came next (Sykes v. Butler).<sup>138</sup>

Jim Johnson ran twice for the Washington Supreme Court,<sup>139</sup> unsuccessfully in 2002 against Mary Fairhurst, and successfully in 2004 against Mary Becker. Both of these elections were for open seats, and in both of them the correlation between the nonpartisan judicial election pattern and the partisan gubernatorial election exceeded 0.9 (0.905 in 2002 and 0.906 in 2004). Johnson was a prominent lawyer and former assistant state attorney general who was known for having represented a number of conservative political and business interests,

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134. Dennis Chaptman, *Sykes Locks up a Term of Her Own*, MILWAUKEE J. SENTINEL, Apr. 5, 2000, at A1.

135. In 2004, Justice Sykes was appointed to the Seventh Circuit Court of Appeals by President George W. Bush. Butler was then appointed by Thompson's Democratic successor, Governor James Doyle, to fill the vacancy created by Sykes's departure. Katherine M. Skiba, *U.S. Senate Approves Sykes for Federal Seat*, MILWAUKEE J. SENTINEL, June 25, 2004, at B1.

136. Richard P. Jones, *Wilcox Wins Easily; Benson Beats Cross Again: Justice Backs Spending Limits in Future Supreme Court Elections*, MILWAUKEE J. SENTINEL, Apr. 2, 1997, at 1.

137. Steve Schuttze & Richard P. Jones, *Election '99: Impact of Vote on High Court Tough to Call*, MILWAUKEE J. SENTINEL, Apr. 4, 1999, at News1; Richard P. Jones, *Election '99: Abrahamson Fends off Rose*, MILWAUKEE J. SENTINEL, Apr. 7, 1999, at News1.

138. A key structural change in the Wisconsin court system that occurred after Dubois's study was the creation of the Wisconsin Court of Appeals in 1977. But it was not until about twenty years later that the election of justices in Wisconsin started to take on a more partisan cast. I noted above the election of Democrat William Bablitch. A similar, negative statistic appears for Justice Shirley Abrahamson the first time she stood for reelection in 1979 after having been appointed to the court by Democratic Governor Patrick Lucey in 1977.

139. For a discussion of judicial elections through about 1995 in Washington, see SHELDON & MAULE, *supra* note 27, at 53–68. Excellent historical background on the Washington Supreme Court can be found in the work of the late Charles Sheldon. See CHARLES H. SHELDON, *A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT* (1988); CHARLES H. SHELDON, *THE WASHINGTON HIGH BENCH: A BIOGRAPHICAL HISTORY OF THE STATE SUPREME COURT, 1889–1991* (1992).

particularly in cases involving property rights.<sup>140</sup> Johnson received endorsements from both the state Republican Party and the state Libertarian Party.<sup>141</sup> In the 2002 election, Johnson's opponent was the senior assistant attorney general and a former president of the state bar association, who was backed by the state Democratic Party as well as by organized labor, environmental groups, and Indian tribes.<sup>142</sup> The election was a squeaker, and was not resolved until all absentee ballots were counted;<sup>143</sup> in the end, Fairhurst won with 50.11% of the vote.<sup>144</sup> In 2006, there was something of a replay of the 2004 election, with an incumbent justice, Gerry Alexander, challenged by another conservative property rights interests attorney, John Groen; Alexander narrowly won the primary which produced a partisan correlation of 0.783.<sup>145</sup> A second race involved an incumbent, Susan Olson, who had faced four challengers in the primary. In the general election she faced a Republican state senator, Steve Johnson, who was also allied with property rights interests and had been a leading proponent of the state's Defense of Marriage Act in 1998. Olson won easily with almost 60% of the vote (carrying all but four of Washington's thirty-nine counties); given Johnson's prominence as a conservative Republican activist, it is not surprising that the partisan pattern was strong, with a correlation of 0.904.<sup>146</sup>

In 2004, Johnson faced appeals court judge, and former Democratic state legislator, Mary Kay Becker.<sup>147</sup> Conservative interests again lined up behind Johnson, and liberal groups backed Becker.<sup>148</sup> Johnson collected a record-setting campaign war chest of over half a mil-

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140. Johnson had served as an assistant state attorney general for about twenty years. See Maureen O'Hagan, *Candidate's Environmental Pitch Challenged*, SEATTLE TIMES, Sept. 29, 2004, at B5.

141. Neil Modie, *Spearman Backs Fairhurst for State High Court*, SEATTLE POST-INTELLIGENCER, Sept. 19, 2002, at B7.

142. See Angela Galloway, *Builders Backing Top-Court Candidate: Johnson Campaign Got \$180,000 from Industry, but He Vows to Be Independent*, SEATTLE POST-INTELLIGENCER, Oct. 25, 2002, at B1.

143. *Girls Rule*, SEATTLE POST-INTELLIGENCER, Nov. 24, 2002, at G1; *Unofficial Results: Federal and State*, SEATTLE POST-INTELLIGENCER, Nov. 6, 2002, at A15.

144. Gregg Herrington, *Fire District Levy Falls Five Votes Short of 60 Percent*, COLUMBIAN (Vancouver, Wash.), Nov. 21, 2002, at C1.

145. Ralph Thomas, *Alexander Prevails in Bitter Court Race*, SEATTLE TIMES, Sept. 21, 2006, at B1.

146. Susan Kelleher, *Owens Wins Another Term After Unusually Costly Race*, SEATTLE TIMES, Nov. 8, 2006, at B5.

147. Becker had served on the appeals court for ten years. See Maureen O'Hagan, *Supreme Court Races Lack Usual Mystery*, SEATTLE TIMES, Oct. 23, 2004, at B1.

148. Ralph Thomas, *Interest Groups Targeting State Supreme Court Races*, SEATTLE TIMES, May 23, 2006, at B1.

lion dollars, surpassing the record he set two years before.<sup>149</sup> Johnson won this time with 52% of the vote.<sup>150</sup>

What might explain the increasingly partisan pattern in Washington? One simple answer is that the supreme court makes decisions on important issues that people and groups care greatly about. Why should one be surprised that groups that care greatly about these issues want to see justices and judges on the courts who are likely to share their perspectives? For example, in July 2006, the Washington Supreme Court handed down a decision upholding the state's ban on gay marriage.<sup>151</sup> The controlling majority on the court found that the gay marriage ban met rational basis scrutiny.<sup>152</sup> Justice Alexander concurred, joined by Justice Johnson, noting that the same-sex marriage ban would survive strict scrutiny because there is "a compelling governmental interest in preserving the institution of marriage."<sup>153</sup> The dissenting opinion was authored by Justice Mary Fairhurst, who had defeated Johnson in 2002.<sup>154</sup> Furthermore, issues of natural resources and development policies have long been extremely important in Western states, and particularly so in the Northwest;<sup>155</sup> it should not be surprising that groups with interests in these areas will want judges and justices whom they see as sympathetic to their causes.

### 3. *States Using Nonpartisan Elections but with Partisan Nominations*

Let us now turn to Michigan and Ohio, two states that employ a mixed system of partisan nomination and nonpartisan elections. Figure 11 shows a scatterplot of correlations for the two states. The data points for 1948 through 1974 are from Dubois;<sup>156</sup> I compiled and com-

149. *Id.*

150. *Id.* In the wake of the 2004 Washington state supreme court election, the Washington Legislature extended limits on campaign contributions, which had not previously applied to judicial elections. Presumably, this would preclude large contributions from groups (or individuals) such as Cruise Specialists, who contributed \$112,000 to Johnson's campaign because it was upset with an appellate decision upholding a multimillion dollar judgment against it that had been authored by Johnson's opponent. *Id.*

151. *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); see also Adam Liptak & Timothy Egan, *A Sharply Divided Washington Supreme Court Upholds State's Ban on Same-Sex Marriage*, N.Y. TIMES, July 27, 2006, at A18.

152. *Andersen*, 138 P.3d at 990.

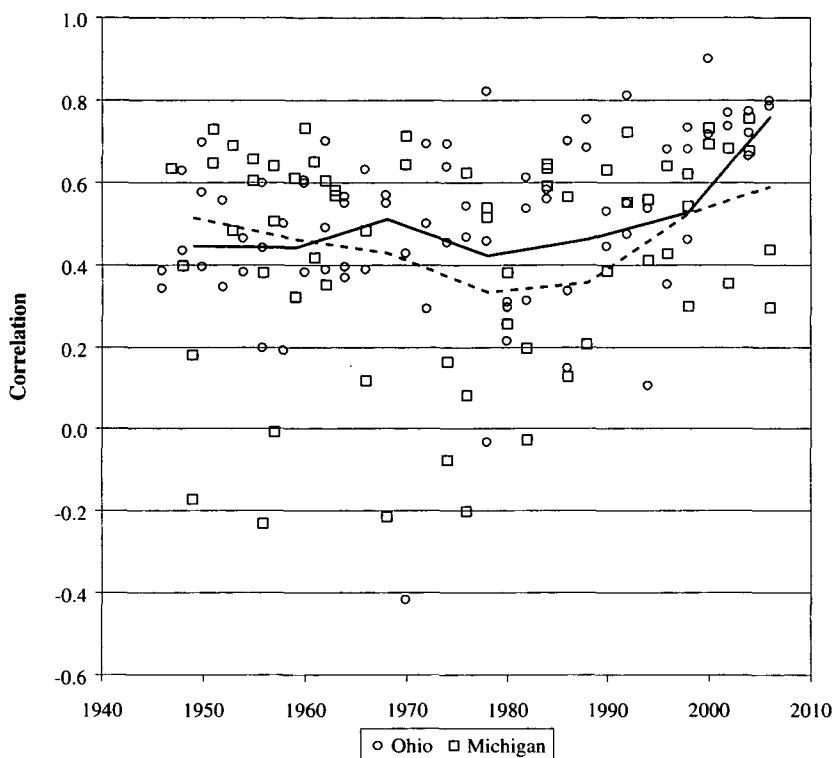
153. *Id.* at 1010 (Alexander, J., concurring).

154. *Id.* at 1012-27 (Fairhurst, J., dissenting).

155. Justice William Douglas, who was raised in the state of Washington, was long associated with environmental causes. See WILLIAM O. DOUGLAS, *MUIR OF THE MOUNTAINS* (1961); WILLIAM O. DOUGLAS, *MY WILDERNESS: EAST TO KATAHDIN* (1961); WILLIAM O. DOUGLAS, *MY WILDERNESS: THE PACIFIC WEST* (1960); WILLIAM O. DOUGLAS, *OF MEN AND MOUNTAINS* (1950); WILLIAM O. DOUGLAS, *A WILDERNESS BILL OF RIGHTS* (1965).

156. Dubois, *Judicial Elections in the States*, *supra* note 109, tbl.4 at 150-51.

FIGURE 11: PARTISAN VOTING PATTERNS IN STATES WITH PARTISAN NOMINATIONS FOR NONPARTISAN JUDICIAL ELECTIONS, 1946–2004<sup>157</sup>



Note: Solid line is Ohio; broken line is Michigan

puted the relevant statistics for 1946 and for after 1974. I calculated averages for each decade represented in the data. Through the 1990s, these averages fluctuated between about 0.33 and 0.50, showing no clear pattern of increase. For the current decade, however, the averages for Ohio and Michigan are 0.74 and 0.65 respectively, suggesting that partisanship may have in fact increased in the most recent period; this increase is shown by the lines for the decade averages for each of the two states.

In some ways, Ohio is the more interesting of the two states because of the strong association between some family names and the Republican Party.<sup>158</sup> In the 1940s, Ohio Senator Robert Taft, the oldest son

157. For the correlations from 1948 to 1974, see *id.* I computed the other correlations using data compiled from various sources, see *supra* note 116.

158. A fair amount has been written on judicial elections in Ohio. See, e.g., Kara Baker, Comment, *Is Justice for Sale in Ohio? An Examination of Ohio Judicial Elections and Suggestions for Reform Focusing on the 2000 Race for the Ohio Supreme Court*, 35 AKRON L. REV. 159

of President and Chief Justice William Howard Taft, was known as Mr. Republican.<sup>159</sup> Robert Taft unsuccessfully sought the Republican nomination for President in 1940, 1948, and 1952.<sup>160</sup> His son Robert A. Taft, Jr. was elected to the U.S. Senate, and his grandson Robert A. Taft III was elected Governor of Ohio. A member of the Taft family, Kingsley A. Taft, served on the Ohio Supreme Court from 1949 through 1970.<sup>161</sup> The partisan patterns when Taft was running tended to be high (0.63, 0.60, 0.70, and 0.55). Another Taft, Sheldon A. Taft, ran unsuccessfully for the court in 1974, challenging incumbent Frank Celebrezze, a well-known Democrat.<sup>162</sup> Not surprisingly, in this latter election, there was a strong partisan correlation (0.69).<sup>163</sup> In fact, when Celebrezze ran for chief justice in 1978 against his Republican colleague on the bench, Thomas Herbert,<sup>164</sup> the partisan correlation reached 0.818, which was the highest up until that time.

A second well-known name that was once associated with the Republican Party in Ohio is Brown. Ted W. Brown served as the Republican Secretary of State from 1950 to 1978.<sup>165</sup> One of the congressional districts in central Ohio was represented by Clarence Brown (and then his son, Clarence Jr.) for many years; in 1982, Clarence Jr. was the Republican candidate for governor.<sup>166</sup> Over the years, a number of candidates named Brown have run for the Ohio Supreme Court. Republican Paul W. Brown ran successfully in 1964,

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(2001–2002); Barber, *supra* note 53; Lawrence Baum, *Explaining the Vote in Judicial Elections: The 1984 Ohio Supreme Court Elections*, 40 W. POL. Q. 361 (1987) [hereinafter Baum, *Explaining the Vote*]; Lawrence Baum, *Voters' Information in Judicial Elections: The 1986 Contests for the Ohio Supreme Court*, 77 KY. L.J. 645 (1988–1989); Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 CAP. U. L. REV. 523, 525–39 (2002); Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300 (1992); Marie Hojnacki & Lawrence Baum, *"New-Style" Judicial Campaigns and the Voters: Economic Issues and Union Members in Ohio*, 45 W. POL. Q. 921 (1992); Klein & Baum, *supra* note 49; Michael E. Solimine, *The False Promise of Judicial Elections in Ohio*, 30 CAP. U. L. REV. 559 (2002); Bradley Link, Note, *Had Enough in Ohio? Time to Reform Ohio's Judicial Selection Process*, 51 CLEV. ST. L. REV. 123 (2004).

159. See JAMES T. PATTERSON, *MR. REPUBLICAN: A BIOGRAPHY OF ROBERT A. TAFT* (1972).

160. *Id.* at 205–22, 409–18, 547–66.

161. See The Supreme Court of Ohio, Judges and Justices of the Supreme Court, <http://www.sconet.state.oh.us/introduction/alljustices/default.asp> (last visited Jan. 27, 2007).

162. See Jennifer Brunner Ohio Secretary of State, <http://www.sos.state.oh.us/sos/Elections/Voter/results1970s.aspx?> (last visited Jan. 27, 2007).

163. DUBOIS, *FROM BALLOT TO BENCH*, *supra* note 77, at 83.

164. *Id.*

165. *Ted Brown Dies at 78; Ohio Secretary of State*, N.Y. TIMES, Aug. 21, 1984, at B10.

166. In recent years, Brown has become more closely associated with the Democratic Party, with the chairman of the Ohio Democratic Party, Chris Redfern, remarking in 2006 that "in Ohio, Brown's name is golden." Ian Urbina, *Popular Ohio Democrat Drops out of Race, and Perhaps Politics*, N.Y. TIMES, Feb. 14, 2006, at A13.

1966, and 1972, each time showing moderate partisan patterns (0.56, 0.63, and 0.58).<sup>167</sup> In 1970, Democrat Allen Brown ran against Republican J.J.P. Corrigan;<sup>168</sup> Corrigan was a name moderately associated with the Democratic Party, in part because of its Irish origins. In this election, there was clearly some voter confusion, because the partisan pattern was reversed, with a correlation of -0.41.<sup>169</sup> Candidates in Ohio have attempted to take advantage of the name confusion. One example involves Republican C. William O'Neill, who joined the Ohio Supreme Court after serving as the Governor of Ohio.<sup>170</sup> In 1974, he was opposed by Democrat Joseph E. O'Neill.<sup>171</sup>

Between 2000 and 2004, there have been nine elections to the Ohio Supreme Court.<sup>172</sup> As noted previously, the partisan pattern in the election outcomes since 2000 is notably stronger than pre-2000; the average correlation for the earlier period is 0.472, compared to 0.760 for recent years.<sup>173</sup> Moreover, only 4 of the 68 elections through 1998 had correlations exceeding 0.7 while 8 of the 9 recent elections had correlations exceeding 0.7. The 2000 election between Republican Terrence O'Donnell and Democrat Alice Resnick produced a partisan correlation of 0.898. It seems apparent that the partisanship of elections in Ohio is becoming fairly consistent where previously it was spotty.

The overall patterns in Michigan are similar to those in Ohio, although Michigan lacks the kind of prominent political names that seem to play a role in Ohio.<sup>174</sup> Thus, the correlations in Michigan

167. DUBOIS, FROM BALLOT TO BENCH, *supra* note 77, at 83. Paul W. Brown ran again in 1978, after Dubois's study was complete; in that election, he was opposed by Clifford W. Brown. Other Browns who have run for the court over the years are Republican Don P. Brown (1976), and Democrats William B. Brown, Lloyd O. Brown, and Clifford F. Brown. In fact, in the twenty year period from 1960 to 1980, twelve of the sixty candidates in contested supreme court elections had the name "Brown." See Kathleen L. Barber, Nonpartisan Ballots and Voter Confusion in Judicial Elections 30 (1982) (unpublished manuscript presented at the 1982 Annual Meeting of the Midwest Political Science Ass'n) (on file with author).

168. DUBOIS, FROM BALLOT TO BENCH, *supra* note 77, at 84.

169. *Id.*; see also Barber, *supra* note 53, at 779-80.

170. In 2004 and 2006, Democrat William M. O'Neill ran unsuccessfully for the court.

171. Jennifer Brunner Ohio Secretary of State, *supra* note 162.

172. Lawrence Baum studied voting decisions in the 1984 Ohio Supreme Court election using a postelection survey of Ohio voters. The 1984 election had a strong partisan ring to it, with Democratic candidates having names linked to the Democratic Party. Not surprisingly, Baum found that voters' own partisanship played the strongest role in their voting decisions. See Baum, *Explaining the Vote*, *supra* note 158.

173. The average for the 1990s was 0.513.

174. This is not to say that name games never get played in Michigan. There have been several candidates named Cavanagh or Kavanagh. In 1966, Democrat Thomas M. Kavanagh was elected to the court; he was reelected in 1974, and died in office in 1975. In 1968, Democrat Thomas G. Kavanagh was elected to the court; in 1976 he was reelected even though the Demo-

have not been quite as high as in Ohio. In the period prior to 2000, the average correlation was 0.415, compared to 0.590 since 2000. Only one election in Michigan since 2000 has had a correlation exceeding 0.7 (in Ohio, there were four such elections prior to 2000).<sup>175</sup>

Both Ohio and Michigan show evidence of increasingly partisan voting patterns, although it is a bit more ambiguous in Michigan. In recent years the states have had some highly contentious elections for the state supreme court, although the increased partisan patterns do not necessarily coincide with the contentiousness of specific elections.

#### 4. *Summary*

Partisanship is important in elections. Given all that we know about voter behavior, it should not be surprising that voters use the information party labels provide. Importantly, we have seen increasing links to partisanship in judicial elections even when party labels are not provided. Exactly why this is the case is not necessarily clear from the data. However, a likely partial explanation is the combination of an increase in campaign expenditures by interest groups and the endorsement of candidates in nonpartisan elections by political parties (at least in Washington). These developments have a greater impact today because in recent years the parties have come to represent clear differences on a variety of issues, and hence provide even better information to voters than they did through much of the second half of the twentieth century.

One must not overstate the significance of the increased partisanship described above. While the aggregate patterns show increased partisanship, this does not necessarily translate into increased partisanship in the *outcomes* of judicial elections. Certainly in states that employ partisan elections, a realignment between the parties will show up in which party dominates the state supreme court. Thus, it comes as no surprise that the once Democratic supreme courts of Alabama and Texas are today Republican. It has become extremely difficult for Democrats to win any statewide office in those states and, at least in Texas, elections for the supreme court and the court of crimi-

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cratic convention nominated someone else for the position. In 1982, Democrat Michael F. Cavanagh was elected to the court, and was subsequently reelected in 1990 and 1998.

175. One of the challenges of doing this analysis for Michigan is that many of the elections are for multiple seats; voters can cast as many votes as there are seats open, and the requisite number of candidates with the most votes win the seats. I have followed Dubois's approach of matching Democratic and Republican candidates such that the candidate with the most votes from one party is paired with the candidate with the least votes from the other party. If there are three seats, the middle vote-getters from each party are paired. See DUBOIS, FROM BALLOT TO BENCH, *supra* note 77, at 274 n.42.

nal appeals are frequently uncontested by a candidate from the Democratic Party. However, in a state such as Ohio, which has seen an increased partisan pattern in voting in judicial elections, incumbency remains a dominant feature, which means that in the same election both Democratic and Republican incumbents will be reelected to the Ohio Supreme Court.<sup>176</sup>

### III. THE IMPACT OF JUDICIAL SELECTION

There is a long line of research by political scientists on the question of whether the different selection systems we employ produce differences among the judges, either in terms of who the judges are or in terms of the kinds of decisions judges make. Much of the evidence on this question has been mixed, with some showing effects at the margins<sup>177</sup> and some showing more systematic effects.<sup>178</sup> To a significant degree, the weak connections typically found in past research seem inconsistent with a number of highly visible recent elections where candidates were perceived as representing significantly different positions on key issues.

In recent years, research has shown that judicial selection methods probably do impact judicial behavior, particularly on hot-button issues. One problem with looking for these effects is finding ways of measuring them. However, several studies have identified indicators of these effects, often focusing on one of the most contentious aspects of criminal justice—the death penalty. Professor Gerald Uelman found that judges in states relying on executive appointment were most likely to overturn death sentences, while those in states using contested elections were most likely to uphold such sentences.<sup>179</sup> Uelman also found that the rate of affirmation increased sharply in

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176. Since 2000, Republicans have dominated in elections for the Ohio Supreme Court, in two cases winning open seats, and winning contested elections as incumbents. The only Democratic incumbent to stand for reelection was Alice Resnick who won reelection in 2000.

177. See, e.g., Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 SOC. SCI. Q. 315 (1990); Nicholas O. Alozie, *Selection Methods and the Recruitment of Women to State Courts of Last Resort*, 77 SOC. SCI. Q. 110 (1996); Burton M. Atkins & Henry R. Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 AM. POL. Q. 427 (1974); Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 LAW & SOC'Y REV. 579 (1972); Herbert Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104 (1964); Stuart S. Nagel, *Comparing Elected and Appointed Judicial Systems* (Sage Professional Paper in American Politics No. 04-001, 1973).

178. See DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY* (1995); Martin A. Levin, *Urban Politics and Judicial Behavior*, 1 J. LEGAL STUD. 193 (1972).

179. Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1137 (1997).



the decade following the defeat of the three California justices.<sup>180</sup> In a series of studies looking at state supreme court decisionmaking in death penalty cases, Professors Hall and Paul Brace also found that the method of judicial selection, and the proximity of elections for judges subject to elections for retaining their seats, are related to decisions in death penalty cases.<sup>181</sup>

A recent paper on this topic by Professors Brace and Brent Boyea demonstrates the impact of selection system in a clearer fashion.<sup>182</sup> Brace and Boyea consider the combination of state-level public opinion and selection system. Their hypothesis is that judges facing the possibility of an opposing candidate in a bid for reelection will be influenced by the views on the death penalty held by the voters who control their future service on the bench.<sup>183</sup> In contrast, they hypothesize little or no effect for judges subject to retention elections, reappointment, or for those who serve until reaching a mandatory retirement age.<sup>184</sup> Looking at states with appointive/retention selection systems, Brace and Boyea found that neither public opinion regarding the death penalty nor the question of whether a judge is seeking reelection or reappointment influences decisions in death penalty cases.<sup>185</sup> In sharp contrast, in states using either partisan or nonpartisan elections, strong public support for the death penalty reduces the likelihood that a justice will vote to reverse in a death penalty case, while a justice who is retiring is more likely to reverse.<sup>186</sup>

A more striking example of elected judges' concern about being "soft" on death penalty cases comes from a study of "jury overrides" by trial judges in capital cases in Alabama. Alabama is one of several

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180. *Id.* at 1136. Uelmen also notes that, in addition to the well-known examples of the three California justices and Penny White in Tennessee, two justices in Mississippi lost reelection bids (at the primary election stage) in the wake of campaigns attacking them for decisions in death penalty cases. *Id.* at 1136-37; see also David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 *MISS. C. L. REV.* 1, 15-20 (1992).

181. Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 *J. POL.* 1206 (1997); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 *J. POL.* 427 (1992); Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 *AM. POL. Q.* 485 (1995); Melinda Gann Hall & Paul Brace, *The Vicissitudes of Death by Decree: Forces Influencing Capital Punishment Decision Making in State Supreme Courts*, 75 *SOC. SCI. Q.* 136 (1994); Melinda Gann Hall & Paul Brace, *Toward an Integrated Model of Judicial Voting Behavior*, 20 *AM. POL. Q.* 147 (1992).

182. Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty and the Practice of Electing Judges* (undated, unpublished manuscript) (on file with author).

183. *Id.* at 7-8.

184. *Id.* at 8-9.

185. *Id.* at 20-22.

186. *Id.* at 22-23.

death penalty states where trial judges may override a jury's recommendation in a capital case regardless of whether that recommendation is for death or for imprisonment.<sup>187</sup> The original logic of giving judges the power to override a jury's recommendation in capital cases was to allow judges to mitigate the expected harshness of juries; it appears that at least some of the states which allow judges life-to-death overrides enacted them out of a misunderstanding of what the Supreme Court required in *Furman v. Georgia*.<sup>188</sup> However, we can see the electoral linkage of such overrides in the timing of when Alabama's judges choose to impose the death penalty rather than accept the jury's recommendation of imprisonment.<sup>189</sup>

Trial judges in Alabama serve six-year terms.<sup>190</sup> If there was no connection between a coming reelection and judges' decisions to override a jury's recommendation of imprisonment, one would expect that overrides would be randomly distributed across judges' time in office. However, if judges are concerned that appearing soft on the death penalty might make them vulnerable to an electoral challenge, one might expect the overrides to be more common in the two years prior to a judge standing for reelection. Between Alabama's adoption of jury overrides and 1998, there were 63 cases in which a judge imposed the death penalty after the jury recommended imprisonment.<sup>191</sup> If there were no connection to the electoral cycle, one would expect an average of just over 10 per year (10.2 to be exact). Table 1 shows the expected distribution and the observed actual distribution. Overrides appear to be more likely as election nears; in fact the probability that the pattern shown in Table 1 could have been produced by a random process is only 0.074.<sup>192</sup>

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187. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 766 (1995) (citing *Harris v. Alabama*, 513 U.S. 504, 516 (1995) (Stevens, J., dissenting)).

188. 408 U.S. 238 (1972); see also Michael L. Radelet & Michael Mello, *Death-to-Life Overrides: Saving the Resources of the Florida Supreme Court*, 20 FLA. ST. U. L. REV. 195, 197 (1992).

189. In fact, Alabama judges are much more likely to override a recommendation of imprisonment than a recommendation of death. Through 1994 or 1995, Alabama judges had rejected a recommendation of death in only 5 cases while rejecting a recommendation of imprisonment in 47 cases. See *Harris*, 513 U.S. at 513. Similarly, between 1972 and 1992, Florida judges had rejected death recommendations 51 times while rejecting life imprisonment recommendations 134 times. See Radelet & Mello, *supra* note 188, at 196, 210. Equally important is that at the time of *Harris*, Alabama appellate courts had never reversed a judge's decision imposing death over the recommendation of the jury. See Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1024.

190. ALA. CONST. art. VI, § 154(a).

191. Burnside, *supra* note 189, at 1041.

192. *Id.*

TABLE 1: DEATH PENALTY OVERRIDES IN ALABAMA<sup>193</sup>

Months Until Election	Expected Number of Overrides	Observed Number of Overrides
1-12	10.3	18
13-24	10.3	9
25-36	10.3	6
37-48	10.3	12
49-60	10.3	12
61-72	10.3	6

Table 2 refines the analysis by splitting the data before and after the 1986 election in which Justice Bird and two of her colleagues in California were defeated in a retention election, largely because they overturned death sentences appealed to the California Supreme Court.<sup>194</sup> There was no discernable pattern prior to the Bird election, but a clear pattern emerged afterward; the chance that the after period pattern could have been produced by a random process is only 0.015.<sup>195</sup> It appears that the election in California had the effect of putting Alabama trial judges on notice that being perceived as soft on the death penalty could lead to electoral challenge and defeat.<sup>196</sup>

#### IV. CONCLUSION

In this Article, I have focused on issues of independence and accountability, with a particular eye to the role of elections in choosing and retaining American judges. The inevitable tension between independence and accountability is one of the fundamental dilemmas of what we call the rule of law. The ideal of the rule of law calls for judges to look only to the law when making their decisions. That assumes, of course, that the law is reasonably clear. If the law is not clear, the influences on judges must extend beyond the law itself; those influences can include the judges' own beliefs and preferences and the judges' perception of the beliefs and preferences of the people they serve.

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193. *Id.*

194. See Culver & Wold, *supra* note 93, at 87-88.

195. Burnside, *supra* note 189, at 1041.

196. A study of sentencing in noncapital cases provides evidence that judges' sentencing decisions in lesser cases is also influenced by the election cycle, with judges imposing harsher sentences as the time for their reelection nears. See Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 261 (2004).

TABLE 2: DEATH PENALTY OVERRIDES IN ALABAMA BEFORE AND AFTER THE 1986 ROSE BIRD ELECTION<sup>197</sup>

Months Until Election	Before Rose Bird Election		After Rose Bird Election	
	Expected Number of Overrides	Observed Number of Overrides	Expected Number of Overrides	Observed Number of Overrides
1-12	3.16	3	7.33	15
13-24	3.16	3	7.33	6
25-36	3.16	4	7.33	2
37-48	3.16	3	7.33	9
49-60	3.16	4	7.33	8
61-72	3.16	2	7.33	4

However, the dilemmas of judicial selection extend beyond the trade-off between accountability and independence that is so fundamental to our notions of the rule of law. When we select judges, we want the process to have transparency, we want the judges chosen on the basis of merit, and we want a judiciary that reflects the diversity of the citizenry.<sup>198</sup> These factors are important for our view of the legitimacy of the courts. If we have significant doubts about the qualifications and ability of our judges, if groups are effectively excluded from judicial service, and if we believe that judges have been selected in ways that serve specific interests and systematically exclude others, our trust and faith in the courts is undermined.

Are there other ways we could select judges that would improve upon the systems now in place? The answer to that depends upon what one means by "improve." We can certainly choose systems that alter the balance between independence and accountability. We can also alter how we take merit and transparency into consideration. Imagine the following system. A nominating commission is selected through a process that combines traditionally political and nonpolitical elements. For example, the ten-person commission might consist of two people selected by the governor of a state, one person selected by the speaker of the lower house of the state legislature, one person selected by the current chief justice, one person selected by the president of the state bar association, two law school deans chosen by lot, and three laypersons chosen by the other members of the commission.

197. Burnside, *supra* note 189, at 1041.

198. See François du Bois, *Judicial Selection in Post-Apartheid South Africa*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 6, at 280, 291-95; Kate Malleson, *Introduction*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 6, at 3, 7-9; Paterson, *supra* note 6, at 14.

The commission could be given a staff to assist in the review of candidates who apply for, or are nominated for, judicial vacancies. For a given vacancy, the commission sends a single name to the appointing authority (presumably the governor) who may appoint the nominee, ask the commission to reconsider the nominee, or reject the nominee. In the latter two situations, the appointing authority must explain the reason for requesting reconsideration or for rejecting the nominee. If the appointing authority rejects the nominee, the commission then forwards a new nominee whom the appointing authority is obligated to appoint.

The nominating commission also serves as a review and assessment commission for sitting judges. At the beginning of the last year of a judge's term, the commission undertakes an assessment of the judge's performance. If eight or more members of the commission believe the judge should continue in office, the judge's appointment is renewed; if less than eight vote for renewal, the judge must stand in a retention election before the electorate.

Is this system nonpolitical? Of course not, but the politics are quite different from what we now see in the United States. The initial selection process resembles the method currently used in Scotland<sup>199</sup> and England<sup>200</sup> (although in England it has only recently gone into operation). The politics come into play in determining who actually gets appointed to the commission, in what role is played by the staff of the commission, in whom the commission consults in assessing candidates, and in how the commission chooses to weigh various criteria in making both initial nominations and in doing the periodic evaluations. The system is not nonpolitical; it is simply differently political. In the minds of some people, such a system would be better than any of the systems now operating in the United States; in the minds of others, it would be deemed worse.

I would be surprised if a system such as the one I have described would be adopted in the near future. Elections will continue to play a major role in our selection and retention of judges. The question then becomes whether we want elections to be meaningful or to play largely symbolic roles in giving the citizenry the impression they have a say in who sits on the benches of our courts. If the public wants to have a significant say, then the best avenue is to reintroduce partisanship in some way. That could mean partisan elections. It could mean

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199. See Judicial Appointments Board for Scotland, <http://www.judicialappointmentsscotland.gov.uk/> (last visited Jan. 27, 2007).

200. See Constitutional Reform Act 2005, ch. 4, § 27, available at <http://www.opsi.gov.uk/acts/acts2005/50004—d.htm#27>.

welcoming parties into the campaign process in nonpartisan elections even while requiring judges to run without partisan identification on the ballot. Or, it could mean inviting parties to create committees or commissions to assess judges standing for retention.

Selecting and retaining government officials, including judges, is fundamentally a political process. That process can be internally political as is the case in bureaucratically organized judiciaries,<sup>201</sup> it can include public officials who are directly answerable to the electorate, or it can involve the electorate itself. How politics plays out in the selection system depends on the structure of that system. How the selection system balances accountability, independence, merit, diversity, and transparency also depends on the specific system. We must make choices. We cannot avoid politics.

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201. For discussions of the Japanese judiciary which is bureaucratically organized, see J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* (2003); John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* (Daniel J. Foote ed., forthcoming 2007), available at [http://law.wustl.edu/uploadedFiles/Faculty/Haley/TheJapaneseJudiciary\\_SSRN.pdf](http://law.wustl.edu/uploadedFiles/Faculty/Haley/TheJapaneseJudiciary_SSRN.pdf); Masaki Abe, *The Internal Control of a Bureaucratic Judiciary: The Case of Japan*, 23 INT'L J. SOC. L. 303 (1995); Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 LAW & SOC. INQUIRY 421 (2005).

